

## THE LAW of TRAFFIC STOPS

### The Stop, Detention, Investigation, and Arrest of a Motorist or Passenger by Alabama Law Enforcement Authority – State and Federal Cases

Prepared by:

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**Editor's Note:** The starting point for any discussion of the applicable law for an Alabama law enforcement officer to stop and detain and subsequently arrest an individual pursuant to a traffic stop is the U.S. Supreme Court's leading decision of *Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* established the rule that a police seizure need not amount to a full arrest in order to subject the seizure to the Constitutional requirements of the Fourth Amendment, and that a seizure of limited duration and limited scope may be reasonable under Fourth Amendment analysis in the absence of traditional probable cause, provided there was '*reasonable suspicion*' to believe the person being stopped and detained had committed or was about to commit an illegal act.

A corresponding state statute on the same subject is found in the *Code of Alabama*, 1975, section 15-5-30, which authorizes an Alabama law enforcement officer to "stop any person abroad in a public place who he reasonably suspects is committing, has committed or is about to commit a felony or other public offense and may demand of him his name, address and an explanation of his actions."

Taken together, both the decisional law of the state and federal courts and the statutory law of the state of Alabama authorize a law enforcement officer to stop, detain, question, and investigate any person "reasonably suspected" of engaging in criminal activity, including traffic violations.

#### **Was the traffic stop a seizure?**

The starting point to determine the lawfulness of any police-citizen encounter in context of the Fourth Amendment is the initial determination of whether the interaction between the police officer and the citizen was voluntary, consensual and non-coercive and thus outside the scope of the Fourth Amendment, or was police-citizen encounter a product of law enforcement authority and show of force, thereby requiring law enforcement compliance with the Constitutional standard of reasonableness.<sup>1</sup>

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<sup>1</sup> See, in general, *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed 2d 497 (1980): "[a] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."

See, also, *United States v. Drayton*, 536 U.S. 194, 201 (2002): A person being questioned by the police is not seized "if a reasonable person would feel free to terminate the encounter."

It has long been held that a police officer, like any citizen, can approach any person in a public area and strike up a conversation, even a conversation concerning the person's participation in or knowledge of criminal activity, without requiring the slightest degree of suspicion on part of the officer, provided the questioned person is free not to respond to the officer's questioning and is free to leave.<sup>2</sup>

However, when a law enforcement officer employs what is termed "show of force" or "show of authority" consistent with his vested law enforcement powers, such use of authority to stop and detain a citizen crosses the boundary of the voluntary and consensual encounter and moves into the realm of the Fourth Amendment.<sup>3</sup>

The regulation of movement of vehicles on the highway by law enforcement is continually scrutinized under Fourth Amendment standards. The police use of emergency lights, police siren, or other indicia of authority to direct a motorist to pull over and come to a stop, which may include simply pointing to a motorist and giving direction by hand signal for the motorist to stop, reviewing courts have consistently held such police actions squarely falling within the concept of "show of force."

There are several overlapping sections of the *Code of Alabama* requiring a motorist to comply with law enforcement authority directing the motorist to yield to law enforcement or to come to a complete stop.<sup>4</sup> Failure to comply subjects the motorist to the additional charge of "attempting to elude." The recently revised "attempting to elude" statute carries heavy penalties, including possible imprisonment, a substantial fine, and the imposition of mandatory driver license suspension if convicted.<sup>5</sup>

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<sup>2</sup> See, e.g., *Florida v. Bostick*, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991): "Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. ... The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. ... Since *Terry*, we have held repeatedly that mere police questioning does not constitute a seizure." 501 U.S. 434.

<sup>3</sup> *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968): "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." See, e.g., *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983): Taking a person stopped at an open airport concourse to a small police office located within the airport for further questioning converted the initial consensual encounter into an unlawful detention.

<sup>4</sup> See, *Code of Alabama*, 1975, section 32-5A-4: "No person shall willfully fail or refuse to comply with any lawful order or direction of any police officer or fireman invested by law with authority to direct, control, or regulate traffic."

See, also, section 32-5A-115 (a): "Upon the immediate approach of an authorized emergency vehicle equipped with at least one lighted lamp and audible signal as is required by law, the driver of every other vehicle shall yield right of way....and shall stop and remain in position until the authorized emergency vehicle has passed...."

In former section 32-5A-193 (a): "Any driver of a motor vehicle who willfully fails or refuses to bring his vehicle to a stop....when given a visual or audible signal to bring the vehicle to a stop shall be guilty of a misdemeanor. The signal given by the police officer may be by hand, voice, emergency light or siren." Section 32-5A-193 was repealed and replaced by 32-5A-340 et seq. effective August 1, 2009.

<sup>5</sup> See, *Code of Alabama*, 1975, 32-5A-342 (c) [effective August 1, 2009]: A violation of the attempting to elude statute shall be a Class A misdemeanor unless the flight caused an actual death or physical injury to a third party, in

Consistent with prior opinions of the Supreme Court, *any* show of force by a law enforcement officer, to include the use of police equipment to indicate to a motorist to stop, even a law enforcement officer's hand gesture to a motorist to pull over, places the burden of Constitutional reasonableness on the government. Such actions are customarily termed a "seizure" under the Fourth Amendment.

The Supreme Court has frequently asserted that the "core,"<sup>6</sup> "basic purpose,"<sup>7</sup> and "central concern"<sup>8</sup> of the Fourth Amendment is the protection of liberty and privacy against arbitrary government interference. The 11<sup>th</sup> U.S. Circuit Court of Appeals flatly stated: "The Fourth Amendment protects individuals from unreasonable search and seizure."<sup>9</sup> Seizure of persons and property conducted without judicial warrant are presumptively invalid, and the burden of proving the lawfulness of the seizure shifts to the prosecution. It is, therefore, the duty of the prosecuting authorities to establish to the trial court that the officer's actions at the time the seizure was made were in conformity with the Fourth Amendment.

The current leading case interpreting police traffic stops within the Constitutional framework is *Whren v. United States*<sup>10</sup> where a unanimous court held that the temporary detention of a motorist upon probable cause to believe that the motorist has violated the traffic law does not violate the Fourth Amendment's prohibition against unreasonable seizures, even if the officer would not have stopped the motorist absent some additional objective.

*Whren* was a significant Fourth Amendment decision as it established a national standard for all courts, state and federal, to use in resolving the then on-going judicial conflict concerning the "objective test" standard based solely on the lawfulness of stop as compared to a more nuanced determination of the officer's "subjective intent." Under the "subjective intent" test, the reviewing court would analyze and determine whether a traffic stop, ostensibly based on violation of the state's traffic code, could be used to gain evidence of other crimes or to acquire information from the driver unrelated to the traffic stop itself.<sup>11</sup>

Prior to the *Whren* decision, such police-citizen traffic stop encounters were commonly termed

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which case the violation shall be a Class C felony. Upon conviction of attempt to elude ... "the court shall order the suspension of the driver's license of the defendant for a period of not less than six months nor more than two years." If the court does not enter a license suspension order, the Department of Public Safety will automatically enter a six month suspension order upon receipt of the notice of conviction.

<sup>6</sup> *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)

<sup>7</sup> *Camera v. Municipal Court*, 387 U.S. 523, 528 (1967)

<sup>8</sup> *Terry*, *supra*.

<sup>9</sup> *United States v. Purcell*, 236 F. 3d 1274, 1277 (11 Cir. 2001)

<sup>10</sup> *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed 2d 89 (1996)

<sup>11</sup> For a full discussion of this issue, Annotation, *Permissibility Under the Fourth Amendment of Detention of Motorist by Police, Following Lawful Stop for Traffic Offense, To Investigate Matters Not Related to Offense*, 118 A.L.R. Fed 567

“pre-textual traffic stops” and depending on the court conducting the review, may or may not, have passed judicial scrutiny. Since *Whren*, all courts now utilize the fact-based inquiry of whether or not an actual traffic violation occurred.<sup>12</sup> If an actual, bona fide traffic violation occurred, such violation would permit any duly sworn and appointed law enforcement officer to exercise his or her authority and conduct a traffic stop. The officer’s subjective intent is thus irrelevant under the *Whren* standard.

The key to the *Whren* holding is the acknowledgement and recognition by the Court that any non-voluntary police-citizen encounter implicates the Fourth Amendment. The Court stated the nexus of the issue in this manner:

“The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures.” Temporary detention of individuals during the stop of an automobile detained by the police, even if only for a brief period and for a limited purpose, constitutes a “seizure” of “persons” within the meaning of this provision. [Citations omitted].

An automobile stop is thus subject to the constitutional imperative that it not be “unreasonable” under the circumstances. *As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.*” (emphasis added) *Whren*, 116 S. Ct. at 1772.

Under *Whren* and all subsequent judicial analysis of police traffic stops, the key question is whether the officer possessed probable cause of a violation of the law at the time the use of force or show of authority was exercised. In other words, had an actual, or reasonably suspected, violation of the law occurred in the officer’s presence to authorize the police to lawfully exercise a show of force and to seize the individual?

### ***Whren* an extension of the *Terry* doctrine:**

Shortly after *Terry* was decided, traffic stops were included under the *Terry* standard for analysis in both the state and federal courts.<sup>13</sup> A traffic stop by use of police authority fell within the scope of *Terry*’s parameters. As example, in *Berkemer v. McCarty*,<sup>14</sup> the Supreme Court held the roadside questioning of a motorist detained pursuant to a routine traffic stop did not amount to a custodial interrogation and stated “the usual traffic stop is more analogous to a so-called ‘*Terry* stop’ than a formal arrest.”<sup>15</sup>

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<sup>12</sup> The central holding in *Whren* concerning the “objective basis” test has been reinforced with subsequent decisions of *Arkansas v. Sullivan*, 532 U.S. 769, 770 (2001) and *City of Indianapolis v. Edmond*, 531 U.S. 32, 45 (2000).

<sup>13</sup> The Supreme Court held that “stopping an automobile and detaining its occupants constitute[s] a ‘seizure’ within the meaning of [the Fourth and Fourteenth ] Amendments, even though the purpose of the stop is limited and the resulting detention is quite brief.” *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). See, also, *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975).

<sup>14</sup> *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)

<sup>15</sup> For an extended discussion of the application of *Terry* to traffic stops, see, Prof. Wayne R. LaFave, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 Michigan L. Rev.

The core concept to any *Terry* based police-citizen encounter is that of objective reasonableness. More specifically, when dealing with automobiles on the highways, the analysis must be based on whether “the police have probable cause to believe that a traffic violation has occurred.”<sup>16</sup> Without the key factor of “probable cause” that a traffic violation has occurred, police action to stop a vehicle is an invalid exercise of police authority and clearly falls into the area of an unlawful detention.

### **Law enforcement officer’s mistaken opinion of law does not authorize a traffic stop:**

In the leading case of *United States v. Chanthasouvat*, 342 F. 3d 1271 (11<sup>th</sup> Cir. 2003), the United States Court of Appeals for the Eleventh Circuit held, in a case of first impression for this circuit, that a police officer’s mistaken impression of the law cannot justify a lawful stop and subsequent search.

In *Chanthasouvat*, two Laotian males were riding in a van traveling through Birmingham on I-20, with Chanthasouvat driving. A Birmingham police officer assigned full-time to the department’s drug interdiction unit stopped the van for not having an *inside mounted* rear view mirror. In fact, the van had an *outside mounted* mirror, but not an interior mirror. The officer testified that he believed the inside mounted mirror was required under the Birmingham Municipal Code. A subsequent consent search of the vehicle recovered 15 kilograms of cocaine.

At the suppression hearing, the police officer admitted that he did not know of any specific section of either the Birmingham Municipal Code or the *Code of Alabama* that required a mirror be placed on the interior of a vehicle, but only that a rearview mirror is located so as to give adequate view to the rear.

The Eleventh Circuit held: “A traffic stop based on an officer’s incorrect but reasonable assessment of facts does not violate the Fourth Amendment. [Citing *Saucier v. Katz*, 533 U.S. 194 (2001)] ... but an officer’s mistaken belief of law will not support a lawful traffic stop.” In *Chanthasouvat*, the 11<sup>th</sup> Circuit joined two other federal circuits in holding that an officer’s mistake of law cannot provide reasonable suspicion or probable cause to justify a traffic stop.

This “mistake of law”- “mistake of fact” distinction is important. Under Alabama law, law enforcement officers are presumed to know the law they are enforcing.<sup>17</sup> Reviewing courts will nearly always give great deference to a law enforcement officer’s mistaken belief of fact, but no such deference is afforded the officer’s mistaken belief of law.<sup>18</sup> Where the seizure is

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1843 (2004) .

<sup>16</sup> *Whren*, supra.

<sup>17</sup> See, *Norris v. City of Montgomery*, 821 So. 2d 149 (Ala. 2001) and *Sadie v. State*, 488 So. 2d 1368, 1379 (Ala. Cr. App. 1986).

<sup>18</sup> See, as example, *United States v. McDonald*, 453 F. 3d 958 (7 Cir. 2006): The reviewing court held invalid under Fourth Amendment grounds where the officer’s stated reason for the traffic stop could not cite any specific violation of the state’s traffic code.

accomplished under the officer's incorrect or deficient knowledge of law, no lawful authority exists to support the seizure.

### **A: Reasonable suspicion to stop; in general**

*Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177, 124 S. Ct. 2451, 159 L.Ed 2d 292 (2004) [Arrest for refusal to provide information to the law enforcement officer.]

“Although it is well established that an officer may ask a suspect to identify himself during a *Terry* stop, it has been an open question whether the suspect can be arrested and prosecuted for refusal to answer, [citation omitted].” 124 S. Ct. at 2458. The Court held that *Terry* principles permit a State to require a suspect to disclose his name in the course of a *Terry* stop, but an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop.<sup>19</sup>

*Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996)

“Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a ‘seizure’ of ‘persons’ within the meaning of the provision. An automobile stop is thus subject to the constitutional imperative that it not be ‘unreasonable’ under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.” 517 U.S. at 809-810.

*U.S. v. Uriostegui*, 420 F. Supp. 2d 1260 (M.D. Ala. 2006)

Reasonable suspicion of a traffic violation justified the traffic stop, regardless of any ulterior motive of the officer. [*Whren* analysis applied to the suppression motion; finding in favor of the government.]

### **B. Traffic stops based on anonymous tips and anonymous informants – in general**

*Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L Ed 2d 301 (1990) -- [vehicle stop-drug possession- anonymous informant]<sup>20</sup>

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<sup>19</sup> In regards to providing a false name or address to law enforcement officer “in the course of the officer’s official duties with intent to mislead the officer,” see *Code of Alabama*, 1975, section 13A-9-18.1, which provides criminal penalties for giving a false name or address to the officer. Alabama’s most comparable statute to the Nevada statute examined in the *Hiible* case is found at *Code of Alabama*, 1975, section 15-5-30, which authorizes a law enforcement officer to “demand of him his name, address, and an explanation of his actions.”

<sup>20</sup> Procedural history: The Alabama Court of Criminal Appeals reversed the trial court’s admission of the drug evidence, holding that the anonymous tip, as corroborated by two Montgomery police detectives, did not provide sufficient indicia of reliability to make an investigatory stop. The Alabama Supreme Court denied the state’s petition for writ of certiorari, but a scholarly and persuasive dissenting opinion was filed by Justice Maddox, with a second justice in dissent. See, 550 So. 2d 1074, aff’d 550 So. 2d 1081 (1989). The Alabama Attorney General’s Office applied for writ of certiorari to the U.S. Supreme Court. The Court granted certiorari to answer a question of first impression under Fourth Amendment law as to whether an anonymous tip, with the essential facts corroborated by police investigation, could provide a sufficient indicia of reliability to conduct a *Terry* stop.

The Supreme Court had previously held in *Illinois v. Gates*, 462 U.S. 213 (1983) that an anonymous letter to the police, once the allegations were verified, could provide the basis for a lawful search warrant under the “totality of the circumstances” test. *Alabama v. White* tested whether an anonymous tip could provide the requisite reliability for

An anonymous telephone tip called into the Montgomery Police Department's secret witness line, stating that a named and described individual, Vanessa White, would, at a particular time, depart an apartment complex and drive a particular and specifically described vehicle from the apartment to a named motel, all of which were particularly identified, and would be in possession of cocaine, taken together and once every fact was verified by the investigating police officers, provided sufficient reasonable suspicion under the standard established in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The Court noted it was a "close case" but under the totality of circumstances, the information was sufficient when considered together with the police officers' corroboration of the details of the tip and with the inference of reliability that arose from the informer's ability to predict the person's future behavior.

**Florida v. J.L.**, 529 U.S. 266, 146 L Ed 2d 254, 120 S. Ct. 1375 (2000): An anonymous tip that a person is carrying a gun, without any further information provided, is insufficient under the Fourth Amendment to justify a police officer's stop and frisk of the subject.

**B.J.C. v. State**, 992 So. 2d 90 (Ala. Cr. App. 2008): An anonymous caller reported to the Tarrant police department that "a black male wearing a sleeveless Chicago Bulls basketball jersey, khaki pants, and a black hat [and] carrying a firearm ... in the 1400 block of Sloan Avenue." A Tarrant police officer was dispatched, and upon encountering a person matching the caller's description, got out of his police vehicle, drew his weapon, and ordered the person to halt. A small handgun was recovered from B.J.C.'s back pocket and a second handgun was in his front waistband.

Held: Citing the factually similar case of *Florida v. J.L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L.Ed. 2d 254 (2000), the Court of Criminal Appeals reversed the trial court's denial of the suppression motion and found that the police officer was not justified in the stop and frisk of B.J.C. and remanded the case for further proceedings. [In *Florida v. J.L.*, the Supreme Court held that an anonymous tip that a person is carrying a gun is not, without more, sufficient to justify a police officer's stop and frisk of that person.]

**W.D.H. v. State**, 16 So. 3d 121 (Ala. Cr. App. 2008): Where a police detective testified that the Montgomery Police narcotics unit had been receiving complaints of a person shooting and selling drugs at a certain block of a housing project, and upon arrival in the area, the detective stated that he did not know specifically what kind of criminal activity may have been taking place, but that "something wasn't right." The detective approached W.D.H. and ordered the subject to submit to a frisk, resulting in the subsequent recovery of a small bag of marijuana in W.D.H.'s pocket.

The appellate Court found the detective's stop and frisk was without basis under the *Terry v. Ohio* standard: "We find that Det. Hamil had no specific, articulable reason for stopping W.D.H.

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a *Terry* "stop and frisk." The question before the Supreme Court was not the validity of the search- the defendant Vanessa White had consented to the search of her purse- but rather, the lawfulness of the initial stop under *Terry* principles. Incidentally, the amount of drugs in question was 1/8 gram of cocaine.

to conduct a pat-down search pursuant to *Terry*.” The later discovery of the marijuana must be suppressed as the product of an illegal search.

[**Editor’s Note:** Judge Welch, writing the Court’s opinion in this case, provided an excellent summary the law of ‘stop and frisk’ under federal and Alabama law, as well lawfulness of searches conducted incident to a ‘stop and frisk.’ Practitioners are encouraged to read the full opinion of this case.]

### **C. Vehicle stop- suspected DUI- anonymous informant; the ‘anonymous tip- drunk driving’ exception to *Terry*:**

*Cottrell v. State*, 971 So. 2d 735 (Ala. Cr. App.): In a case of first impression for an Alabama appellate court, the Court of Criminal Appeals held: “We ...hold that an anonymous tip concerning a potential drunk driver may be sufficiently reliable to justify a *Terry* stop without independent corroboration by the police.”

In *Cottrell*, a Tuscaloosa police officer was on patrol when flagged down by an unknown driver who reported that a specifically described automobile was “swerving all over the road.” The unknown complainant stated he observed the three occupants drinking beer. As the complainant was giving this information, the police officer observed the described vehicle on the roadway, then proceeded forward and initiated a traffic stop. As a result of the traffic stop, a firearm with an altered or removed serial number was recovered. Cottrell was convicted of a state firearms violation under *Code of Alabama*, section 13A-11-64.

Upholding Cottrell’s conviction, the Court of Criminal Appeals contrasted *Florida v. J.L.*, 529 U.S. 266 (2000) to the facts in this case. Although both cases involved the possession of an illegal firearm, Cottrell’s facts resulting in the seizure of the weapon were significantly different. In *Florida v. J.L.*, the Supreme Court addressed whether an anonymous telephone tip that an individual was in a certain location and was carrying a gun was sufficient to stop the individual and conduct a search. The Supreme Court held it did not; the anonymous informant’s tip lacked even the minimal level of indicia of reliability present in *Alabama v. White*, 496 U.S. 325, 329.

The Court of Criminal Appeals in *Cottrell* found these facts distinguishable:

- The informant did not make an anonymous telephone call to the police, but instead flagged down the officer
- The informant’s identity was readily apparent and the license plate number of the vehicle he was operating was observable and could be reported
- The informant could be held accountable for any misinformation provided to the officer

In *Cottrell*, the informant was not totally anonymous as in *Florida v. J.L.* By engaging in a face-to-face encounter with the police, the reliability of the information was increased.

Second, the information concerned a potential crime in progress that exposed the public to great risk. If the driver were intoxicated, then other motorists and pedestrians were threatened. “It is well documented that drunk drivers pose a real and serious risk to themselves and the public. In the interest of public safety, an officer should be able to stop a driver and determine whether he or she is, indeed, driving while intoxicated.”

Declining to impose a *per se* rule concerning the validity of anonymous tips concerning potential impaired drivers, the Court adopted the flexible rule expressed in *United States v. Wheat*, 278 F. 3d 722 (8<sup>th</sup> Cir. 2001): the quantity and quality of the information furnished by the informant; the length of time between the informant’s tip and the police contact with the potential drunk driver; and the informant’s basis of knowledge.

In this particular case, the citizen informant described the make and model of the suspect vehicle; pointed out the vehicle to the police officer; described the erratic driving behavior; and described the occupants of the vehicle. The police officer made immediate visual identification of the suspect vehicle at the same time the description was provided. Based on these facts, the anonymous tip was sufficiently reliable to warrant an investigatory stop, and the gun seized as a result of the stop was correctly received into evidence.

**Editor’s Note:** On October 20, 2009, the U.S. Supreme Court denied certiorari in the case of *Virginia v. Harris*, 276 Va. 698, 668 S.E. 2d 141 (2008), with C.J. Roberts joined by J. Scalia issuing a written dissent to the denial of certiorari. In a 4-3 decision in the Virginia case, that state’s Supreme Court overturned Harris’ DUI conviction and held that an anonymous tip of drunk driving, without independent verification by the police of any violation of the traffic code, did not support a valid traffic stop and subsequent seizure.

C.J. Roberts stated: “I am not sure that the Fourth Amendment requires such independent corroboration before the police can act, at least in the special context of anonymous tips reporting drink driving.” Roberts noted: “This Court has in fact recognized that the dangers posed by drunk drivers are unique, frequently upholding anti-drunk driving policies that might be constitutionally problematic in other, less exigent circumstances.”

Roberts further noted that a majority of state jurisdictions, when confronted with the ‘anonymous tip-drunk driving’ question, have created a special exception to the general rule expressed in *Terry*, while a minority of jurisdictions have taken the same position as the Virginia Supreme Court requiring police officers to first confirm the anonymous tip of drunk driving by personally witnessing a traffic violation take place before stopping the vehicle. Roberts urged the Court to consider accepting a case for review to establish a national standard for the ‘anonymous tip-drunk driving’ situation.

#### **D. Vehicle stop- suspected criminal activity – anonymous informant**

*Ex parte Aaron*, 913 So. 2d 1110 (Ala. 2005): [vehicle stop-anonymous tip]

An anonymous tip, without any intervening police investigation and no record the police did anything to corroborate the information received from a telephone tip held not to establish reasonable suspicion to support stop of a vehicle in which defendant was a passenger.

***Ex parte Shaver***, 894 So. 2d 781 (Ala. 2004): [vehicle stop – anonymous tip] Shaver and his wife stopped at the Wal-Mart store in Russellville, Alabama and purchased multiple packages of over-the-counter cold medication containing pseudoephedrine. [This type medication is a precursor to making methamphetamine.] Wal-Mart employees became suspicious of the purchase. One employee followed Shaver into the parking lot where the employee obtained the license plate number and a description of the vehicle. The Russellville police department was contacted by the Wal-Mart store and placed a look-out on the vehicle. Shaver’s vehicle was stopped a short while later. The cold medication was located in plain view in the vehicle. Shaver was detained and read *Miranda* warnings.

After the warnings were given, Shaver admitted the purchase was intended for methamphetamine production. A written statement wherein Shaver admitted the purchase was to facilitate meth production was also obtained. Shaver was convicted of unlawful manufacture of a controlled substance, reserving his right to appeal. The Court of Criminal Appeals upheld Shaver’s conviction on a 3-2 decision. The Supreme Court granted certiorari.

Held: Reversed and remanded. The only basis the police department had for stopping and detaining Shaver’s vehicle was a telephone call from an unknown individual purportedly calling from the Wal-Mart where the medication was sold. The record does not supply any information to support the conclusion the caller was reliable. The deputy who assisted in the stop testified that no specific information was conveyed in the telephone call. In addition, there was no testimony offered concerning Wal-Mart’s policy to notify the police if the purchase of precursor medications was made under unusual or suspicious circumstances. Moreover, Shaver’s vehicle was stopped without any intervening police investigation. There is nothing in the record to indicate the police did anything to corroborate the information provided prior to the stop. The Supreme Court held: “In absence of the constitutionally required reasonable suspicion to support the initial stop, none of the evidence gained as a result of the stop or the ensuing detention is properly admissible.”

***State v. Strickland***, 934 So. 2d 1084 (Ala. Cr. App. 2005): [telephone tip – identity confirmed] Reversing a motion to suppress and distinguishing ***Ex parte Shaver***, the Court of Criminal Appeals held in ***Strickland*** where an individual went into the same “Dollar Store” in Tuscaloosa three times in one day to purchase large quantities of Sudafed cold medication, and on the second purchase, Strickland told the store clerk that he intended to manufacture methamphetamine and offered the store clerk money to allow him to purchase all the Sudafed medication in the store but was refused; and on the third entry to the store, he was reported to the store manager, who in turn, called the police and gave a detailed report of the individual and vehicle and the circumstances leading to the call. Upon receiving the call to the police station, and prior to the stop of Strickland, a police officer went to the Dollar Store and verified the information before a “BOLO” was issued to the police units in the area.

Held: The information concerning Strickland was not an “anonymous” report, but identified the name and position of the caller, the reason for the call, and the request for a police investigation, all of which was preliminarily checked by a police officer before the stop was made. The police acted properly in the subsequent stop and seizure of Strickland’s automobile.

## **E. Vehicle stop – suspected criminal activity -- known source or informant**

*State v. Green*, 992 So. 2d 82 (Ala. Cr. App. 2008): Green was stopped by a Montgomery police officer approximately six minutes after an armed robbery took place at a laundromat, where three or four black males had entered the location, held guns on several females at the laundromat and had demanded money. [The published opinion stated the several females “spoke little English.”] A be-on-the-lookout (BOLO) was broadcast to on-duty police units stating, initially, there were two suspects, then the broadcast was re-issued stating there were three or four black males in a gray or dark gray vehicle possibly headed south from the laundromat.

Green was stopped about two to three miles northeast of the robbery location operating a gray vehicle. There were three other black males in the vehicle besides Green. Upon the initiation of the traffic stop, the investigating officer saw Green and one passenger place something between the seats. Green was taken out of the vehicle and a search discovered 68 grams of marijuana packed for sale. Then Green and the three others were taken back to the robbery location, where the female victims stated none of the men were participants in the robbery. Green was subsequently charged with possession of marijuana in the first degree, and a suppression motion followed.

The Court of Criminal Appeals cited the factors in *State v. Wise*, 603 So. 2d 61, 63 (Fla. Dist. Ct. App. 1992) in determining the lawfulness of a traffic stop in context of conducting an investigation: “In reaching a well-founded suspicion to stop a vehicle pursuant to a BOLO, a police officer should consider several factors, including: 1) the length of time since the offense, 2) the distance from the offense, 3) the route of the flight, 4) the specificity of the description of the vehicle and its occupants, and 5) the source of the BOLO information.”

The Court found the robbery took place minutes before the traffic stop; that the distance from the robbery location and the traffic stop was between two to three miles; that the police dispatch identified a gray or dark gray vehicle with two to four black males in the vehicle and that Green was operating a gray colored vehicle with three other black males in the vehicle. The Court stated, “[w]e hold that the facts were minimally sufficient, based on the totality-of-the-circumstances, to establish a reasonable suspicion for Officer Ferguson to stop Green’s vehicle to investigate possible criminal activity.”

**[Editor’s Note:** Judge Welch wrote an incisive and strongly-worded dissent:

“My de novo review of the evidence presented in the briefs the parties submitted to the trial court shows that law enforcement officials had a vague description of the suspects’ car and its occupants, they had information indicating that the suspects left the scene of the robbery “possibly” headed south, and that Green was stopped more than a mile northeast of the scene of the robbery, and that only six minutes had elapsed between the first dispatch and the time the police officer first saw Green leaving at the gas station. Such evidence makes it unlikely that Green and his passengers would have been involved in the robbery. Police certainly do not have license to stop and search every gray or dark gray car, regardless of make or model, within a circumference radiating more than a mile from the scene of the robbery, in which two to four black men were riding.” 992 So. 2d at 89.]

***Ex parte Carpenter***, 592 So.2d 627 (Ala. 1991)—[vehicle stop-drugs]

The informant's reliability created a reasonable suspicion to warrant stopping the defendant's car based on the known informant's tip. After the weapon was found, the officer had probable cause to search vehicle.

Once a police officer with reasonable suspicion has stopped a suspect in an automobile, the officer has the authority to ask the suspect to get out of the automobile. The need to protect police and others justifies protective searches when police have a reasonable belief that the suspect poses a danger. Roadside encounters between police and suspects are hazardous and danger may arise from the possible presence of weapons in the area surrounding a suspect.

#### **F. Vehicle stop – police initiated contact**

***Ex parte Betterton***, 527 So.2d 747 (Ala. 1988)

A police officer's approach and questioning of persons seated within a parked car does not constitute a seizure and requires neither reasonable suspicion nor probable cause, and the officer may request but not order occupant to open door or roll down window. Without at least reasonable suspicion of criminal activity, officer may not order suspect out of car.

***State v. Bodereck***, 549 So. 2d 542 (Ala. Cr. App. 1989)

The Court held that police did not have reasonable suspicion to investigate a legally parked car in an area known for drug activity.

***Ex parte Yeung***, 489 So.2d 1106 (Ala. 1986)

While mere suspicion, without more, is not sufficient justification for stopping a vehicle, if the officer can point to independent facts which lead to his "articulable and reasonable" suspicion that the vehicle is unregistered or that its occupants have violated some law, then stopping the vehicle would be justified under the Fourth Amendment.

***Williams v. State***, 716 So. 2d 753 (Ala. Cr. App. 1998): Defendant's walking in high crime area, seeing a marked police unit, attempted to change course, held sufficient to allow police stop to ask name and identification. Upon learning defendant's name, the officers discovered three active *capias* warrants.

Held: Police officers had a reasonable suspicion to justify the stop which led to a lawful seizure of individual, which in turn led to search of defendant's clothing where drugs were found.

***S.W. v. State***, 703 So. 2d 427 (Ala. Cr. App. 1997)

The fact that the defendant and his passengers were the only vehicle or persons in the immediate area, after police officer received a report of "proowler call" where a report of a vehicle was broken into, and upon stopping the vehicle, the officer noticed an unmounted radar detector, screwdrivers, and other items consistent with auto burglary, the Court held the officer's stop was reasonable under the facts and circumstances.

The Court contrasted the *S.W.* case with ***Duckworth v. State***, 612 So. 2d 1284 (Ala. Cr. App. 1992). In *Duckworth*, the Court held it was unreasonable for an officer to stop a car in a high

crime area late at night simply because the vehicle “looked out of place.” *Duckworth* is distinguishable because in this case the officer had been dispatched to a reported crime that had just occurred and there were no other persons, on foot or in a vehicle, in the vicinity when the officer arrived.

***Richardson v. City of Trussville***, 492 So.2d 625 (Ala.Cr.App. 1985)

Observance of the defendant’s car in a dentist’s office parking lot at an early hour of the morning and the fact that officers had been called to burglaries at dentist’s office several times in recent months justified warrantless investigatory stop.

### **G. Vehicle Stop-suspected criminal activity- “high crime” activity area**

**Editor’s Note:** Since the *Terry* decision was released in 1968, with the judicially imposed requirement of “reasonable suspicion” becoming the Constitutional standard, there has developed a sub-species of *Terry* stops known as “high crime area” stops. The following cases from the Alabama appellate courts discuss the concept of “high-crime area” in relation to the authority of law enforcement to conduct a lawful investigatory stop:

***Gaskins v. State***, 565 So. 2d 675 (Ala. Cr. App. 1990): “While the fact that someone was in a high crime neighborhood is not by itself enough to raise a “reasonable suspicion,” an area’s disposition toward criminal activity is an articulable fact to be considered.” [Citing as authority *Brown v. Texas*, 443 U.S. 47 (1979) at 52: “The fact appellant was in a neighborhood frequented by drug users standing alone, is not a basis for concluding the appellant himself was engaged in criminal conduct.”]

In *Gaskins*, the facts only indicated an unknown person was seen standing near the driver’s side door of a vehicle and as the officer approached the location, the person who was standing near the vehicle walked away, and the operator of the vehicle, Gaskins, drove off. These facts, standing alone, despite the locale being termed a “high-crime area” did not establish the requisite degree of reasonable suspicion to conduct a lawful stop of the vehicle. There was no indication any exchange took place between the two persons; the defendant drove off at normal speed; no evidence was offered that the defendant sped off or made an attempt to elude; there was no prior report of criminal activity; and the other person did not make an attempt to flee the scene; taken together despite the officer’s statement that the immediate area was “notorious for drug activity” was insufficient to establish any reasonable suspicion.

***New v. State***, 674 So. 2d 1377 (Ala. Cr. App. 1995): The state’s case consisted of testimony from the arresting officer where: 1) three white youths were out at 3:30 a.m. in a predominately black neighborhood; 2) the vehicle operated by the three white youths was moving 15 to 20 miles per hour in a 25 mph speed limit area; 3) the vehicle was being driven with no apparent destination; 4) the area was a location in which automobile burglaries had recently occurred; and 5) one of the passengers looked back at the police officer a few times.

Held: None of these facts, collectively or independently, provided the police officer with sufficient reasonable suspicion that he was involved in criminal activity. Citing *Duckworth v. State*, 612 So. 2d 1284 (Ala. Cr. App. 1992) and *Harris v. State*, 568 So. 2d 421 (Ala. Cr. App.

1990), operating a vehicle at or below the posted speed limit in the early morning hours in an area of recent thefts and burglaries did not constitute sufficient reason to conduct an investigatory stop. The Court held in *New*: “A group of teenagers driving late at night during the summer in a high crime area while obeying the traffic laws does not give rise to reasonable suspicion that they are engaged in criminal activity.”

***Kelley v. State***, 870 So. 2d 711 (Ala. 2003): Distinguishing ***Ex parte Tucker***, 667 So. 2d 1339 (Ala. 1995), the Alabama Supreme Court held in ***Kelley*** that the reports of recent, widespread, and on-going criminal activity at a particular establishment, coupled with the arresting officer’s detailed observations of a quick and “furtive” exchange of money with the defendant immediately slipping a container into her jacket pocket, as well as the officer’s specialized knowledge and training in narcotics investigations, were sufficient to establish reasonable suspicion of a drug transaction, therefore authorizing the officer to stop and search the defendant. The Court held in ***Tucker***, “The fact that persons have gathered in a high crime area cannot alone establish probable cause justifying a warrantless search and seizure of containers in their possession.” The ***Kelley*** case was objectively different: the arresting officer had personally observed the drug courier furtively handle a small container and slide it into the hand of the defendant, who in turn, secreted the container in her jacket.

The Court in the ***Kelley*** decision cited ***Sibron v. New York***, 392 U.S. 40 (1968): “Deliberatively furtive actions and flight at the approach of strangers or law enforcement officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.” ***Sibron***, 392 U.S. at 66-67.

***Abner v. State***, 741 So. 2d 440 (Ala. Cr. App. 1998): Where the defendant was approached by a police officer and the officer later testified that he observed clear plastic bag sticking partly out of defendant’s right front pants pocket, and the sole reason for the subsequent search of the defendant was the officer’s observing the plastic bag on the person of the defendant, the Court held the police did not have probable cause to arrest him or to search him, and therefore, the subsequent seizure of controlled substances was illegal and must be suppressed. Analyzing the facts in this case in light of the prior case of ***Ex parte Tucker***, the Court held where there was no evidence of any prior illegal activity in the area; there was no evidence of any attempt to flee the police upon the officer’s approach; and the defendant made no attempt to secrete the plastic bag; taken together made the police officer’s intrusion into defendant’s pocket illegal and the subsequent seizure the product of an illegal search.

## **H. Traffic stop for DUI on private property**

***Hinson v. State***, \_\_\_ So. 2d \_\_\_, 2008 WL 4369256 (Ala. Cr. App. Sept. 26, 2008). [Editor’s Note: This case was affirmed by unpublished memorandum, with Judge Welch and McMillan concurring and Judges Baschab and Shaw concurring in result; Judge Wise dissented.]

Hinson was arrested for DUI by a Houston County deputy sheriff after the deputy saw Hinson back his vehicle down the driveway, and upon seeing the Sheriff’s patrol car in the immediate vicinity of his driveway, Hinson then changed direction, and went back up the driveway of his

residence. At no time did Hinson enter a public highway or roadway. The deputy continued on patrol and as the deputy went past Hinson's residence a second time, the deputy noted that Hinson's vehicle was now operated by a woman and Hinson was seated in the passenger side.

Hinson was ordered out of the vehicle and directed to perform a series of field sobriety tests and subsequently arrested for DUI. The woman driving the vehicle was not asked to perform any field sobriety tests and was not charged with any offense.

The question before the Court was whether Hinson's operation of the vehicle in his own driveway was sufficient to constitute the offense of DUI. Judge Wise noted the fact that most traffic offenses are limited to the "highways" of this state under the terms of *Code of Alabama*, 1975, section 32-5A-2. However, included in that section is the following:

“(2) The provisions of ... Sections 32-5A-190 through 32-5A-195 shall apply upon highways and elsewhere throughout the state.”

Judge Wise wrote: “I believe that the facts of this case are closer to those in *Lunceford v. City of Northport*, 555 So. 2d 246 (Ala.Crim. App. 1988) than those in *Adams v. State*.”

[**Editor's Note:** In *Lunceford*, the defendant was located in actual physical control of a vehicle in a shopping center. The Court found that while the DUI statute applied to arrests made on private property locations, such as a parking lot, the state's Implied Consent Statute did not, because the terms of the Implied Consent Statute are limited to the “public highways of this state.” See, *Code of Alabama*, 1975, section 32-5-192 (a).]

Judge Wise noted that no previous Alabama case had ever held that a person could be convicted of DUI while operating a vehicle on their own private property, and opined that such government action could raise “significant Fourth Amendment concerns.”

### **I. Reasonable suspicion to stop; specific criminal offense or traffic violation**

***No tag displayed and no operable tag light: U.S. v. Hernandez-Arellano***, 2006 WL 2864406 (M.D. Ala. Oct. 5, 2006)

Stop of defendant's vehicle by an Alabama state trooper for violation of no valid tag displayed on the vehicle and not having an operable tag light was a lawful stop under the Fourth Amendment, despite the fact the stop was made at the request of a DEA agent investigating the transportation of marijuana by the defendant and suspected marijuana was concealed in the vehicle.

***No headlights on vehicle at night: Strickland v. City of Dothan***, 399 F. Supp. 2d 1275 (M.D. Ala. 2005)

Motorist's operation of a vehicle without headlights at night provided probable cause to stop vehicle.

***Improper lane usage: Galindo v. State***, 949 So. 2d 951 (Ala. Cr. App. 2005) By unpublished memorandum, a 3-2 majority of the Court of Criminal Appeals held that a single crossing of the

“fog line” on an interstate highway constitutes improper lane usage justifying a traffic stop.

In *Galindo*, a deputy sheriff stopped Galindo after observing Galindo’s operation for a period of time on the interstate highway, and then, after following the vehicle, noted a single cross-over of the solid white painted fog line. Judge Shaw’s dissent noted, “The record indicates that Sgt. Hammonds [the deputy] initiated his stop based solely on Galindo’s *single* 6 to 12 inch deviation from the lane onto the shoulder of the highway.” (emphasis in original opinion).

Judge Shaw noted that the Code section in question does not require absolute compliance, but rather states: “(1) A vehicle shall be driven *as nearly as practicable* entirely within a single lane and shall not be moved from such lane *until the driver has first ascertained that such movement can be made with safety*.” (emphasis in Court’s opinion). “The express language of this statute constitutes recognition by the Legislature that it is not practicable, perhaps not even possible, for a motorist to maintain a single lane at all times and under all circumstances and that the crucial legislative concern is safety rather than precision driving.... The statute specifically provides that even when a brief deviation from a lane occurs, no traffic violation results unless the driver fails to ascertain that his or her movements could be made with safety.” 949 So. 2d at 954.

Judge Shaw determined that the majority of state and federal courts deciding the issue of whether or not a single deviation from travel exclusively in the lane, and crossing the median center line or fog line on the right, constituted improper lane usage, have held that a driver’s crossing over the fog line one time for a moment does not, standing alone, justify a traffic stop. However, a minority of courts have reached a different conclusion. Judge Shaw urged the Court to adopt the majority view that in the absence of erratic driving by the motorist, a minor and momentary “drifting” of the vehicle from the lane of travel across the painted fog line does not justify an intrusive stop by an officer.

***Speeding and running a stop sign: Gilbert v. State***, 686 So.2d 266 (Ala.Civ.App. 1996), cert denied (without approval), ***Ex parte Gilbert***, 686 So.2d 267 (Ala. 1996): Traffic violations of speeding and running stop sign justified *Terry* stop of vehicle.

***Erratic vehicle operation: Gwarjanski v. State***, 700 So. 2d 357 (Ala. Cr. App. 1996)  
State trooper had reasonable suspicion for a traffic stop where the officer observed the defendant’s vehicle tailgating, swerving within its lane, changing lanes improperly, and crossing the center line, and braking abruptly.

***Crossing the center line: Gradford v. City of Huntsville***, 557 So. 2d 1330 (Ala. Cr. App. 1989)  
Sufficient reason for lawful traffic stop existed where officer observed vehicle cross center line into wrong side of the road three or four times.

***Failure to stop for blue lights and attempting to elude: Sawyer v. City of Marion***, 666 So. 2d 113 (Ala.Cr.App. 1995) –

There was no stop or seizure when officer, while following motorist with his blue lights flashing, saw motorist commit traffic violations he was charged with. The officer testified that he recognized the driver as someone whose driving privileges he knew had been suspended. The police officer turned on the blue lights on his patrol car, turned around in the intersection, and

headed south to stop the driver. The officer pursued the driver for several blocks with his blue lights flashing. He finally turned on his siren, and the driver stopped. The officer ticketed the driver for attempting to elude a police officer, failure to stop at a stop sign, and reckless driving.

The court held that there was no “stop” or “seizure” when Carter, the officer, followed the appellant with his blue lights flashing, and observed Sawyer commit the traffic violations he was charged. A police officer may arrest any person without a warrant for any public offense committed in his presence. §15-10-3, *Code of Alabama* 1975.

Sawyer also contended that he could not have known whether to stop because Carter turned on his blue lights but not his siren. However, police are not required to turn on a siren in order to stop a motorist. Section 32-5A-193, *Code of Alabama* 1975, provides that a police officer need only give “a visual or audible signal to bring the vehicle to a stop.” “The signal given by the police officer may be by hand, voice, emergency light or siren.” § 32-5A-193, *Code of Alabama* 1975. [Editor’s Note: 32-5A-193 was repealed and replaced by section 32-5A-300 effective August 1, 2009.]

**Information provided by another officer: *Martinez v. State***, 624 So.2d 711 (Ala.Cr.App. 1993)  
Trooper had probable cause to stop driver based on information that he received from another trooper that driver had been speeding.

**Witness report: *Leverette v. State***, 594 So.2d 731 (Ala.Cr.App. 1992)  
Officer made lawful stop of the defendant’s car based on witness’s report that car was being driven erratically. The fact that officer did not personally observe defendant acting or driving in an erratic or otherwise intoxicated manner did not render stop illegal.

**Erratic operation: *Jones v. State***, 579 So.2d 66 (Ala.Cr.App. 1991)  
Officer had reasonable suspicion to stop defendant where the officer heard the “squealing of tires and racing of an engine,” heard a vehicle approaching, and a “few minutes” later observed the defendant’s truck. In addition, the officer observed the truck for about ¼ mile before it was stopped and determined that it was traveling at an unsafe rate of speed, although the officer could not determine how fast the truck was traveling.

**Radio report: *Bryant v. City of Gadsden***, 574 So.2d 919 (Ala.Cr.App. 1990)  
Officer had reasonable suspicion to stop defendant’s vehicle: officer had observed car hit a curb and almost hit a stop sign after he had received radio dispatch that another officer had motorist had been seen drinking a beer in his car and driving erratically. Officer making the stop could properly rely on and consider the information contained in the radio message in making the decision to stop the motorist.

**Collective knowledge: *Ex parte Boyd***, 542 So.2d 1276 (Ala. 1989) Held: Where a group of officers is conducting an operation and there is at least minimal communication among them, the collective knowledge of the officers may be considered in determining probable cause.

**High speed operation: *Cone v. City of Midfield***, 561 So.2d 1126 (Ala.Cr.App. 1990)  
The arresting officer had reasonable suspicion to stop the defendant’s vehicle after he observed

the truck being driven at 60 m.p.h. in a 20 m.p.h. speed zone and where he observed the truck swerving over the center line.

***Parked vehicle: Martin v. State***, 529 So.2d 1032 (Ala.Cr.App. 1988)

Trooper had reasonable suspicion justifying investigation of vehicle where the vehicle was parked on shoulder of highway during rush hour, driver's door partially opened and obstructing traffic, and driver and passenger were asleep.

***Violation of traffic light: Baker v. City of Huntsville***, 516 So.2d 927 (Ala.Cr.App. 1987)

Reasonable suspicion for vehicle stop existed where officer observed vehicle run red light.

***Avoid stopping at a roadblock: Smith v. State***, 515 So.2d 149 (Ala.Cr.App. 1987)

Trooper had reasonable suspicion for investigatory stop where he observed defendant's vehicle coming around curve in sight of roadblock and turn rapidly into driveway making trooper suspicious that the defendant was attempting to avoid the roadblock.

***Avoid stopping at a roadblock: State v. White***, \_\_\_ So. 3d \_\_\_, 2009 WL 2415202 (Ala. Cr. App. Aug. 7, 2009): Defendant's conduct in approaching a driver license checkpoint, turning around, and then heading in the opposite direction, provided the officer with reasonable suspicion justifying an investigatory stop.

***Parked on roadway: Scurlock v. State***, 487 So. 2d 286 (Ala.Cr.App. 1986)

Officer who observed automobile parked on the side of the road with emergency lights flashing at 2:45 a.m. and who observed defendant sitting behind the steering wheel drinking something from a bottle had reasonable suspicion warranting investigatory stop.

***Parked on roadway: Spann v. State***, 440 So.2d 1224 (Ala.Cr.App. 1983)

Where officer observed car parked on shoulder of highway seven miles from town at nighttime, with the engine not running but the headlights on, and the defendant seated behind the steering wheel with his head down as if asleep, officer was justified in requesting defendant to step from car and produce identification. When defendant did so and appeared unsteady on his feet and his speech was slurred, officer properly arrested the defendant for DUI.

***Information provided by another officer: Parker v. State***, 397 So.2d 199 (Ala.Cr.App. 1981)

Officer had probable cause to stop the defendant's car where another officer radioed him to stop the car.

***Information provided by another officer: Gaddy v. State***, 698 So. 2d 1100 (Ala. Cr. App. 1995)

Knowledge of one officer is imputed to another officer in the situation of a radio call directing the second officer to stop a vehicle.

But see, ***Jordan v. State***, 549 So.2d 161 (Ala.Cr.App. 1989) [drugs- custodial arrest rather than *Terry* stop]

Where the police, acting upon a anonymous telephone tip, used three patrol cars to stop the motorist, approached his car with weapons drawn, ordered the motorist and passenger out of car and frisked them, the court found a full custodial arrest rather than a mere investigatory stop.

## J. Reckless Driving: Validity of reckless driving arrests under Alabama's traffic code:

The state's reckless driving statute, *Code of Alabama*, 1975, Section 32-5A-190(a), states:

“Any person who drives any vehicle carelessly and heedlessly in willful or wanton disregard for the rights or safety of persons or property, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving.”

The term “reckless driving” under the Alabama Code is not precisely defined. The term “reckless driving” or “recklessness” is often in the eye of the beholder and is highly dependent upon the facts, circumstances and events. No one case of “reckless driving” is precisely like the next case. Basically, the Alabama reckless driving statute is a two pronged approach to criminalize any highly dangerous, or “reckless,” operation of a motor vehicle:

- 1) Part one of the statute deals with the “willful and wanton disregard for the rights and safety” of other persons or property. This presumably includes, among other actions, a *conscious disregard of the safety of other persons and grossly erratic vehicle operation*, but not necessarily high speed operation or even a series of traffic violations indicating heedless operation, but operating a vehicle while demonstrating a complete and total disregard for the safety or property of others by operating in a reckless manner. In other words, “reckless driving” is the gross deviation from ordinary prudence required of operating a vehicle and creates a substantial risk of injury; it is a callous disregard for the danger created by the driver's conduct.
- 2) Part two of the statute is better understood and more inclusive of the term “reckless” operation. Part two uses the terms “*without due caution . . . and at a speed or in a manner so as to endanger or be likely to endanger . . .*” Part two of the statute requires both a lack of caution on part of a driver (but not the intentional disregard of the rights of others), plus either speed or the manner of operation.

If the prosecution proceeds under the state's reckless driving statute, there are the elements of mental status (conscious disregard/without due caution) plus the vehicle operation itself. While it is commonly, but mistakenly, believed that high speed operation alone constitutes “reckless driving,” the editor has found no case in Alabama law that has held speeding, in and of itself, to constitute the violation of “reckless driving.”

A number of Alabama cases have previously construed “reckless driving” under the *Code of Alabama*. These fact situations include: intentionally ramming another vehicle during a high speed chase; the combined operation of driving on the wrong side of the road, swerving, and failing to stop at a stop sign; passing in a dangerous manner while operating a vehicle under the influence; failure to stop at a stop sign and weaving within a lane; and driving erratically while speeding.

In the case of *Bradford v. State*, 448 So.2d 574 (Ala. Crim. App. 2006), the Court of Criminal Appeals upheld a conviction of reckless driving, but remanded the case to the trial court for re-sentencing, where the defendant was involved in a high speed chase and rammed a vehicle

which, in turn, rammed a police car. In the case of *Casey v. State*, 740 So.2d 1136 (Ala. Crim. App. 1998), the Court of Criminal Appeals upheld a conviction of reckless driving where the defendant drove on the wrong side of the road, swerved several times, and ran a stop sign.

In the case of *Krumm v. City of Robertsdale*, 648 So.2d 651 (Ala. Crim. App. 1994), the Court of Criminal Appeals upheld a conviction of reckless driving and a conviction of driving under the influence where the defendant passed another vehicle in an area on highway where double-yellow lines separated the northbound and southbound lanes of traffic.

Other cases from the Court of Criminal Appeals hold similarly: In the case of *Hargrove v. City of Rainbow City*, 619 So.2d 944 (Ala. Crim. App. 1993), the Court of Criminal Appeals found that the trial court had enough evidence to convict the defendant of reckless driving where the officer observed the defendant fail to stop at stop sign, weave within in his traffic lane, and make a right turn without stopping at a red light. In the case of *Sanders v. City of Birmingham*, 542 So.2d 325 (Ala. Crim. App. 1988), the Court of Criminal Appeals upheld a reckless driving conviction where the defendant drove his vehicle “erratically” while speeding and weaving in and out of traffic. Taken as a whole, the cited cases indicate that substantially dangerous and highly irresponsible driving conduct is necessary to sustain a conviction of reckless driving.

By contrast, the recent case of *Zann v. State*, \_\_\_ So.2d \_\_\_, 2009 WL 487689, (Ala. Crim. App. 2009), the Court of Criminal Appeals reversed and rendered a conviction of reckless driving and held that the defendant was not reckless driving when he allowed the tires on his passenger side to cross over the shoulder for a period of one second while the defendant was driving five or six miles per hour over the speed limit. Judge Welch, writing for a unanimous court, held Zann’s operation of his vehicle did not rise to the level of reckless driving as the defendant’s conduct was not a “willful or wanton disregard for the rights or safety of others.” *Id.*

#### **K. Detaining the motorist; length and scope of detention**

*State v. Hale*, 990 So. 2d 450 (Ala. Cr. App. 2008): In a continuing series of recent appellate cases regarding the lawful detention of a motorist and the length of time permitted to detain a motorist, the prior case of *Peters v. State*, 859 So. 2d 451 (Ala. Cr. App. 2003) has all but faded as authority. In *State v. Hale*, an Alabama state trooper stopped Hale for following too closely and subsequently issued a warning citation. While in the process of issuing the warning citation, the first trooper called a second trooper to the scene for “back-up.” The first trooper returned to Hale’s vehicle, offered the warning citation to Hale and returned Hale’s driver license.

As soon as the driver license was handed back, the trooper asked if Hale had any guns or drugs in the vehicle and if he [Hale] would consent to search. Hale replied that the officer could search the vehicle, but did not see any need to do so. Obtaining this ambiguous reply, the trooper summoned a drug dog to conduct a ‘walk-around’ of Hale’s vehicle. The dog subsequently alerted to Hale’s vehicle and cocaine powder was recovered from the vehicle.

In granting the defendant’s motion to suppress, the trial court relied on *Peters v. State* which held:

“ ‘Once the traffic offender signs the U.T.T.C. [in this case, a warning citation], the arresting officer is to “forthwith release him from custody.” section 32-1-4(a)[,Ala. Code 1975]. The officer may further detain the driver only if he has probable cause to arrest the

driver for some other-non-traffic offense, see *Hawkins v. State*, 585 So.2d 154 (Ala. 1991), or has a reasonable suspicion of the driver's involvement in some other criminal activity justifying further detention for investigatory purposes under *Terry v. Ohio* [392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed 2d 889 (1968) ], see *United States v. Tapia*, 912 F. 2d 1367 (11<sup>th</sup> Cir. 1990).” Peters, 859 So. 2d at 452-454.

However, in the *Hale* case, the Court of Criminal Appeals found the fact to be more similar to the case of *Tillman v. State*, 647 So. 2d 7 (Ala. Cr. App. 1994), where in *Tillman*, the officer had lawfully stopped Tillman's van for an expired tag violation and prepared a traffic ticket for Tillman to sign. Tillman signed the citation, and the officer handed her a copy of the citation and her driver license. Only after returning the documents did the officer then ask if she had any drugs or weapons in the vehicle and when she said no, the officer asked if he could search the vehicle. Tillman consented to the search. The Court previously stated in *Tillman*: “A mere request on the part of a law enforcement officer to search a vehicle after pulling the vehicle over for a legitimate purpose does not amount to a detention of the person of whom the request is made, assuming the officer has disposed of the legitimate purpose for which the vehicle was stopped.”

The Court found Hale's facts to closely resemble the fact situation in *Tillman* in that the first trooper had issued a warning citation and returned his driver license, then requested his consent to search. The Court found that Hale had been released from custody at the time the documents were returned and any submission by Hale to the trooper's request to search was consensual.

***Smith v. State***, 606 So. 2d 174 (Ala. Cr. App. 1992)

Once a traffic violation is observed, police may stop the vehicle and order the driver to remain in the vehicle or require the driver to exit the vehicle, even though the officer may lack a particularized reason for believing the driver possesses a weapon, citing *New York v. Class*, 475 U.S. 106 (1986).

***State v. McPherson***, 892 So. 2d 448 (Ala. Cr. App. 2004) -- [Vehicle stop; length of detention]

A state trooper made a traffic stop of McPherson who, according to the trooper, demonstrated a high degree of nervous behavior during the initial encounter. The trooper detained the motorist for approximately twenty-eight minutes until a canine unit arrived and established probable cause to believe drugs were located in the vehicle. [***Editor's Note:*** the traffic stop was videotaped by the trooper, thus permitting the exact time of each event.]

The initial stop took place at 10:03 a.m., and the trooper and the motorist engaged in conversation, whereupon the trooper took note of the motorist's apparent nervousness. The trooper called a second trooper in the area who was a certified canine handler. The second officer and canine arrived at 10:22 a.m., some 19 minutes later, and shortly thereafter, gave a positive response to McPherson's vehicle. Drugs were found in the vehicle after the trooper conducted a search.

The trial court granted McPherson's motion to suppress. On appeal by the state, the Court of Criminal Appeals, in a 3-2 decision, found a motorist may be lawfully detained for a brief

period. In this case, the motorist had not signed the ticket prior to the first trooper calling the second trooper to the location. The second trooper conducted the walk-around of the motorist's vehicle in 19 minutes from the time of the initial stop, and while the trooper was waiting for the NCIC report to come back on a weapon that McPherson was carrying. "Based on our review of the testimony and the videotape, we conclude that Peoples [the trooper] did not detain the appellee for an unreasonable amount of time during the traffic stop."

Judge Cobb dissenting: "The question is whether Officer Peoples had an objective basis at the time of the stop or developed one during the stop to believe McPherson was in possession of drugs ... [I]t is well established that a defendant's nervousness or agitation alone is not a reasonable suspicion of criminal activity to justify continued detention after a traffic stop." Judge Cobb went on to write that the facts in this case are so similar to the facts in *State v. Washington* (below) that the Court should either follow *Washington* as precedent for affirming the trial court's order to suppress the evidence or overrule *Washington*. 892 So.2d at 456.

*State v. Washington*, 623 So. 2d 392 (Ala. Cr. App. 1993):

The trial court, in granting the defendant's suppression motion, found the facts that Washington had a temporary driver's license issued by Louisiana, that the license plate on the car was temporary, that the car was rented to a third party and the rental agreement did not list Washington as a driver, and the state trooper conducting the stop found Washington to be highly nervous during the traffic stop; all of which did not, either individually or collectively, create reasonable suspicion to detain Washington for a period of some one hour and twenty minutes until drugs were found secreted in the vehicle after a dog team arrived and alerted to the driver's door.

While an officer may require a motorist to sit in a patrol car while the officer completes a ticket for a traffic offense, once the traffic offender signs the UTTC, the arresting officer must forthwith release him from custody. See, § 32-1-4(a). The officer may further detain the driver only if he has probable cause to arrest the driver for some other non-traffic offense, or has a reasonable suspicion of the driver's involvement in some other criminal activity justifying further detention for investigatory purposes under *Terry v. Ohio*. A reasonable suspicion exists only if the officer has specific, particularized, and articulable reasons indicating that the person stopped may be involved in criminal activity.

*Peters v. State*, 859 So. 2d 451 (Ala. Cr. App. 2003)

A state trooper stopped Peters for following too closely behind another vehicle. The trooper testified at the subsequent suppression hearing that Peters seemed agitated at being stopped and remained in an agitated state after being told he was only receiving a warning citation. The trooper stated that Peters tried to avoid conversation or eye contact with the officer. When asked if there was anything "illegal" about the pick-up truck he was operating, the trooper stated that Peters looked at the ground and dropped his chin to his chest, which the trooper believed to be signs of deception. Peters was asked for consent to search, which he refused. Peters was then detained until a drug detector dog could arrive on the scene in a few minutes. The first dog team arrived shortly thereafter and immediately "hit" on the rear of the pick-up truck. A second dog team arrived on the scene and also alerted to the rear of the truck. The trooper then had the camper shell opened and found two duffle bags, both containing compressed marijuana inside

the duffle bag. Peters was then arrested for trafficking in marijuana.

Peters argued the search and evidence should have been suppressed because the trooper did not have a reasonable suspicion to hold Peters for the canine unit to search<sup>21</sup> the truck.

In a 3-2 decision, the Court held once the traffic offender signs the UTTC, the arresting officer is to forthwith release him from custody. (Citing 32-1-4 (a)). The officer may further detain the driver only if he has probable cause to arrest the driver for some other nontraffic offense (Citing *Hawkins v. State*, 585 So. 2d 154 (Ala. 1991)), or has a reasonable suspicion of the driver's involvement in some other criminal activity justifying further detention for investigatory purposes under *Terry v. Ohio*.

*Smith v. State*, 953 So. 2d 445 (Ala. Cr. App. 2006): quoting *Peters v. State*, supra, for authority, "Once the traffic offender signs the UTTC, the arresting officer is to "forthwith release him from custody."... The officer may further detain the driver only if he has probable cause to arrest the driver for some other non-traffic offense, see *Hawkins v. State*, 585 So. 2d 154 (Ala. 1991), or has a reasonable suspicion of the driver's involvement in some other criminal activity justifying further detention for investigatory purposes under *Terry v. Ohio*,..."

The Court held that a police officer's prolonged detention of motorist after driver signed the UTTC for a tag light violation was an involuntary detention, and the additional period of detention required to summon a drug dog violated the standard expressed in *Code of Alabama*, section 32-1-4.

Where Smith was stopped solely for an equipment violation and the officer acknowledged that he had no belief that Smith was involved in any criminal activity, a second officer arriving on the scene and offering the opinion that Smith may have, at some previous time, been involved in drugs did not supply "a particularized and objective basis" for Smith's continued detention. Defendant's refusal to consent to search could not have supplied reasonable suspicion. *State v. Washington*, 623 So. 2d 392. The subsequent detention and seizure of controlled substances was held invalid and conviction reversed.

### **Federal Cases – drug and currency seizures- lawfulness of the traffic stop, detention of the motorist, and scope of the search:**

**Editor's Note:** For the past fifteen to twenty years, officers of the Department of Public Safety, as well as other jurisdictions within Alabama, have operated interstate interdiction patrols specifically trained and intended to detect and intercept drug and currency trafficking. Subjects arrested by state and local law enforcement authorities are frequently processed through the federal district court under the U.S. Justice Department's 'Adoptive Seizure' program, which allows the U.S. Attorneys in each federal district to federally "adopt" a state or local seizure. This activity, in turn, has created a substantial body of recently decided federal cases from the

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<sup>21</sup> The word "search" was used in the Court's majority opinion. However, in view of *U.S. v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L.Ed. 2d 110 (1983) and later dog-sniff cases, the great majority of federal and state courts have held that a dog sniff used to establish probable cause to search does not constitute a search itself under the Fourth Amendment. See, especially, *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005): a dog sniff of the exterior of a lawfully stopped vehicle during a traffic stop does not constitute a search under the Fourth Amendment.

U.S. District Courts in Alabama, as well as the Eleventh Circuit Court of Appeals, concerning traffic stops made by Alabama law enforcement officers.

***U.S. v. Five Hundred Eleven Thousand Seven Hundred Eighty Dollars (\$511,780) in U.S. Currency***, 847 F.Supp. 908 (M.D.Ala. 1994)

There are generally three types of police-citizen encounters--

- 1) Consensual encounters involving no coercion or detention, which requires no degree of suspicion by the police;
- 2) Brief or temporary detention, known as an investigative stop, which requires the police to have a “reasonable suspicion” that the person has committed or is about to commit a crime; and
- 3) Full-scale detention or arrest which requires the police to have “probable cause” to believe the person has committed a crime.

In this case, the two subjects stopped by state troopers were not in any type of custody. The officer was holding the subject’s driver license as part of a roadside inquiry, based on the facts that the vehicle, a rental truck, had a broken air-conditioner and the day was unusually hot, but the driver and passenger had refused to trade it for another rental truck with a working air-conditioner<sup>22</sup>; the fact that the driver and passenger stated they were driving from central Florida to Houston, Texas, but were driving back-roads in a circuitous fashion in apparent attempt to avoid the interstate which was the direct route; the fact the trooper who first clocked the vehicle on radar in excess of the speed limit stated the rental truck merely slowed down and would not come to a stop for an extended period; all indicators of the possibility the driver and passenger might be engaged in criminal activity.

The officer did not seize driver during traffic stop by taking driver’s license, but had sufficient reason, based on a totality of the circumstances, to investigate the driver and passenger. The resulting consensual search, where \$511,780 in cash was recovered, was upheld as valid.

***United States v. Bivins***, 2007 WL 1673926 (M.D. Ala, June 11, 2007)

Where the driver, Bivins, gave an inconsistent and implausible explanation of the purpose for the trip, gave false information about his past criminal record, and the trooper noted discrepancies in the rental agreement, the trooper conducting the traffic stop had sufficient reasonable and articulable suspicion to continue the questioning, contrasting the facts in ***U.S. v. Perkins***, cited below, with the facts present in this traffic stop. The trooper received valid consent to search from Bivins, and the cocaine recovered from the vehicle was properly admissible into evidence. ***United States v. Gonzalez***, 275 Fed. Appx. 930, 2008 WL 1923073 (11 Cir. 2008) [Defendant

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<sup>22</sup> Defendants were first reported to the police when the two individuals, driving from central Florida to Texas, had stopped at the authorized rental truck location in Dothan, Alabama and complained the truck’s air-conditioning was not working. When offered a different truck by the manager, who noticed the limited amount of cargo in the truck storage area and offered to help off-load the furniture, but was refused the offer, and the fact the truck was nowhere near I-10, the most direct route from Florida to Texas, the manager’s suspicions were aroused. The manager telephoned the local police who, in turn, contacted the state trooper office that the vehicle was headed northbound from Houston County into Dale County. The trooper making the stop clocked the vehicle on radar at 65 mph in a 55 mph zone, and then realized the vehicle was the subject of the look-out.

was charged with concealing and transporting \$132,615 in currency from the United States to Mexico, with intent to evade currency reporting requirements in violation of 31 U.S.C. 5332.]

Gonzalez challenged the traffic stop and seizure, claiming the traffic stop was improperly extended beyond the duration necessary to effectuate the stop and the officer's request to search the vehicle was unsupported by probable cause.

Held: The trooper's stop of the vehicle, after observing the tractor-trailer cross the fog line three times, was objectively lawful. During the initial questioning of the driver, the trooper noticed evasiveness when Gonzalez was asked specifically if he was transporting any large sums of money. Gonzalez consented to a search of the trailer unit, but not the tractor. A narcotics detector dog was summoned to the scene, and upon arrival, the canine immediately alerted to the door of the tractor and the upper bunk within the tractor where a cardboard box containing bundles of currency was located. The entire traffic stop, including the search, required approximately twenty minutes. The 11<sup>th</sup> Circuit held the fact that only eight to ten minutes had elapsed between the initial stop and the request for consent was not unreasonable, nor was the fact the driver was placed in the patrol unit's "cage" while the canine was in use.

[In the *Gonzalez* case at the district court, the magistrate judge cited *U.S. v. Purcell*, 236 F. 3d 1274 (11 Cir. 2001) and *U.S. v. Hardy*, 855 F. 2d 753 (11 Cir. 1988) as controlling authority. The district court held the detention period was not unreasonable. The trooper's actions in having the defendant sit in the back seat of the patrol car while the search was conducted did not constitute an arrest, citing *Los Angeles County, CA v. Rettle*, 550 U.S. 609, 127 S. Ct. 1989 (2007). "Once the canine alerted to Gonzalez' tractor, the alert supplied not only reasonable suspicion, but probable cause to search the property on which the dog alerted." Therefore, the search of the tractor and the seizure of the money did not violate the Fourth Amendment. *United States v. Gonzalez*, 2007 WL 1673926 (M.D. Ala. June 11, 2007)]

***United States v. Perkins***, 348 F. 3d 965 (11 Cir. 2003) [Unlawful period of detention] Upholding a motion to suppress issued by the federal district court of the Middle District of Alabama, based on a traffic stop made by an Alabama state trooper, the Court found that while the duration of the traffic stop was not itself violative of the Fourth Amendment, but the continued detention of the motorist was a violation once the warning citation process was completed. The driver's nervousness and the differing, but not inconsistent statements between the driver and passenger, and the fact the driver had an out-of-state license but claimed to live in Alabama did not provide the requisite reasonable suspicion to justify the continuation of the stop after the warning ticket was given.

"A traffic stop may be prolonged where an officer is able to articulate a reasonable suspicion of other illegal activity beyond the traffic offense." [Citing ***United States v. Purcell***, 236 F. 3d 1274 (11 Cir. 2001)]. "In this Circuit we have required more than the innocuous characteristics of nervousness, a habit of repeating questions, and an out-of-state license for giving rise to reasonable suspicion."

[But see also ***United States v. Hardy***, 855 F. 2d 753 (11 Cir. 1988): holding that an investigative stop of 50 minutes duration is not unreasonable when the officer developed facts and

circumstances supporting the continued detention. (The *Hardy* case originated from Northern District of Georgia.)]

*U.S. v. Hernandez*, 418 F. 3d 1206 (11 Cir. 2005): An Alabama state trooper stopped a vehicle for speeding, held the defendant for 17 minutes while the trooper prepared the citation and conducted routine investigation of the driver's status, then received a consent to search form signed by the defendant; 10 minutes later a drug dog arrived on the scene and alerted to the interior of the vehicle where cocaine was found in a hidden compartment.

The 11<sup>th</sup> Circuit in reversing the trial court found no Fourth Amendment violation in regards to the initial stop, the temporary detention, or the subsequent search. The Court noted that the officer developed reasonable suspicion from the first minute of the stop, including nonstop travel at night in inclement weather; food containers on a long trip which indicated an unwillingness to leave the vehicle unattended; a small amount of luggage for a purported week-long stay; implausible excuse for speeding; inconsistent statements; a general nervousness; and lack of knowledge about the destination. Taken together, these factors would justify detention of the motorist under the Fourth Amendment to allow law enforcement authority sufficient time to summon a narcotics detection dog.

*United States v. Steed*, et al, 548 F. 3d 961 (11 Cir. 2008): Following denial of motion to suppress, defendant Osgood was convicted in the United States District Court for the Northern District of Alabama of possession with intent to distribute 100 kilograms or more of marijuana. The defendant appealed claiming, among other issues, the law enforcement officer's search of the tractor-trailer violated the Supreme Court's decision in *New York v. Burger*, 482 U.S. 691 (1987) dealing with warrantless administrative searches.

In this case, a law enforcement officer working for the Interstate Criminal Enforcement Unit of the Hoover, Alabama police department was monitoring traffic from the median of I-20. The officer stated the tractor-trailer was following too closely. At that point, and without turning on emergency lights, the officer entered the I-20 traffic lane and pulled up alongside the truck, at which point the truck attempted to move into the officer's lane of travel. The officer then activated his emergency lights and pulled the truck over.

The officer informed Osgood, the driver, that he would be performing a 'Level II' inspection of the truck, requiring the officer to review the truck's paperwork and equipment. The officer conducted this inspection pursuant to Alabama statute 32-9A-3 which states in part:

“Any records required to be maintained by operators of commercial motor vehicles pursuant to state or federal laws or regulations shall be open to inspection during normal business hours of a carrier by members designated by the director.”

During the inspection of the motor vehicle, the officer noted several discrepancies, omissions, and irregularities contained with the driver's required log book and paperwork. At some point, a canine officer was called to the scene and a 'walk-around' was done, whereupon the canine alerted to the interior of the vehicle. A subsequent search revealed 1,600 pounds of marijuana.

The 11<sup>th</sup> Circuit reviewed the District Court's denial of motion to suppress with respect to the claim the officer's stop and subsequent inspection were both invalid. First, the Court found the traffic stop was reasonable under two different state traffic statutes: following too closely and improper lane change. Second, the Court found the officer's detention of the tractor-trailer was reasonable and not in violation of the *Burger* ruling.

In *Burger*, the Supreme Court laid out a three-part test for determining whether a warrantless administrative inspection in highly regulated industries comports with the Fourth Amendment:

- 1) There must be a substantial government interest that informs the regulatory scheme pursuant to the inspection;
- 2) The warrantless inspections must be necessary to further the regulatory scheme;
- 3) The inspection's program, in terms of certainty and regularity, must provide a constitutionally adequate substitute for a warrant. (*Burger* at 482 U.S. 702-703)

The 11<sup>th</sup> Circuit noted that every other federal circuit court that has reviewed commercial trucking has found the trucking industry to be a pervasively regulated industry within the meaning of *Burger*. Second, the state statute was specifically designed to allow state law enforcement officers to enforce the Federal Motor Carrier Safety Regulations<sup>23</sup>, and allows designated officials to enforce both state and federal Codes and regulations. The statute in question is specifically limited to "commercial motor vehicle" industry and permits inspections "during normal business hours." The fact that the inspection was not limited to a specific place does not invalidate the officer's authority, in view of the fact the trucking industry is by necessity highly mobile. Thus, the officer's reliance on the state statute for authority was reasonable under *Illinois v. Krull*, 480 U.S. 340 (1987) which upheld the lawfulness of an inspection where the inspecting officer reasonably relied on the validity of the existing statute. Conviction affirmed.

***United States v. Ramirez***, 476 F. 3d 1231 (11 Cir. 2007): Once the officer issued the formal traffic citation and returned defendant's license and registration to him, the *Terry* traffic stop turned into a consensual encounter, and therefore defendant was not detained for Fourth Amendment purposes at the time when the officer asked follow-up questions and the defendant offered to allow his car to be searched.

The *Ramirez* court cited the previous case of ***United States v. Pruitt***, 174 F. 3d 1220 (11 Cir. 1999) for authority that a police officer may lawfully lengthen the detention of a motorist for further questioning beyond that related to the initial stop under two circumstances: 1) if the

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<sup>23</sup> The editor, while employed with the Department of Public Safety, was the author of this statute, titled the 'Motor Carrier Safety Act of 1998' now codified at Title 32, chapter 9A. Section 32-9A-2(a) specifically states: "No law enforcement officer may make an arrest or issue a citation under this chapter unless he or she has satisfactorily completed, as part of his or her training, the basic course of instruction developed by the Commercial Vehicle Safety Alliance." Additionally, annual re-certification is required.

The Court's opinion in *U.S. v. Steed* is silent as to whether the arresting officer was properly credentialed and authorized to conduct CVSA inspections; the issue may not have been raised at the trial court level.

officer has an objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring; 2) if the initial detention has become a consensual encounter. *Pruitt*, 174 F. 3d at 1220. For purposes of the second situation, a consensual encounter does not implicate the Fourth Amendment.

In *Ramirez*, Alabama state trooper Corporal Martin stopped Ramirez for a minor traffic violation. Upon initial question concerning the ownership of the vehicle and the purpose of his trip from Brownsville, Texas to south Florida, and after receiving vague and contradictory answers, Martin issued a warning citation to Ramirez, returned all documents belonging to Ramirez, and stated “the traffic stop was over.” Martin then asked Ramirez if he was carrying anything illegal in the vehicle. Ramirez responded that Martin could search the car if he wanted. Martin then obtained a written consent to search and upon roadside investigation of Ramirez’s vehicle, uncovered seven kilograms of cocaine hidden inside the dashboard of the vehicle.

Ramirez’s motion to suppress was denied. The Court found that a reasonable person in the defendant’s circumstances would have felt free to terminate the encounter and to decline the officer’s request for further information.

*United States v. Viezca*, 555 F. Supp. 1254 (M.D. Ala. 2008): State trooper’s traffic stop of truck and trailer was not prolonged within the context of *Terry* when the trooper lawfully stopped the vehicle for speeding and the driver could not produce any registration for the truck, but instead gave the trooper a title in another person’s name; the driver could not produce proof of insurance for the vehicle; the driver stated that she was going to North Carolina to purchase cars at an auction, but could not give the name of the city where the auction was located; and referred other questions to her passenger. The passenger stated they were going to South Carolina. When the trooper asked the driver if she had any previous arrests, she stated ‘no,’ but then admitted to prior arrests for smuggling persons across the border.

A close inspection of the trailer axles by the trooper noted fresh tool marks on the bolts. The trooper then struck the axle with his flashlight, and instead of hearing a hollow ‘echo’ sound, heard a ‘thud’ which indicated that the axle was packed with material. A subsequent inspection of the axle uncovered 16 packages of cocaine, approximately eight kilos in weight.

Defendant’s motion to suppress was properly denied in light of the reason for the initial stop was speeding in excess of the posted speed limit was a lawful basis for the traffic stop. The trooper’s reasonable questions concerning ownership and insurance requirements were answered with conflicting stories by the driver and passenger. The conflict in stated destination, purpose for the trip, and other basic facts all gave the trooper additional reasons to hold the vehicle and occupants for further investigation. The Court noted, “an officer has ‘the duty to investigate suspicious circumstances that then [come] to his attention.’” Citing *United States v. Harris*, 928 F.2d 1113 (11 Cir. 1991).

See also, the following additional cases from the 11<sup>th</sup> Circuit:

- *United States v. Simms*, 385 F. 3d 1347 (11 Cir. 2004): When making a determination of reasonable suspicion for prolonging a traffic stop, the court must look at the totality of circumstances.
- *United States v. Purcell*, 236 F. 3d 1274 (11 Cir. 2001): A traffic stop of 14 minutes not unreasonable on its face.
- *United States v. Simmons*, 172 F. 3d 775 (11 Cir. 1999): A law enforcement officer is entitled to check both the car and driver, including running a computer check for outstanding warrants.
- *United States v. Codd*, 956 F. 2d 1109 (11 Cir. 1992): A two and half hour investigative detention is too long for a *Terry* stop.
- *United States v. Pruitt*, 174 F. 3d 1215 (11 Cir. 1999): Holding the fact the driver was Hispanic and the he held an out-of-state driver license was not enough to detain him beyond the issuance of a traffic ticket.
- *United States v. Holloman*, 113 F. 3d 192 (11 Cir. 1997): A fourth amendment violation may occur when a motorist stopped for a license check is detained beyond the completion of the license check to wait for the arrival of a drug-detection dog.

**Civil liability and qualified immunity:** A recent case from U.S. District Court, Middle District of Alabama, granted qualified immunity and summary judgment to state trooper in a 42 U.S.C. 1983 action. The state trooper held plaintiff/motorist for approximately 45 minutes from start of traffic stop until release, when motorist denied any prior drug activity but was determined to have a previous drug conviction on his N.C.I.C. record. The motorist was stopped in an area known for drug trafficking, failed to provide truthful answers about his driver license, and gave other indicators of evasiveness, and the trooper then called for a drug dog to conduct a walk-around of the vehicle operated by the motorist. Such actions by the trooper were lawful and permissible under Fourth Amendment analysis. *Morris v. Dean*, 2006 US District Lexis 54417 (M.D. Ala., July 31, 2006), *affm'd* 223 Fed. Appx. 937 (11 Cir. 2007)

See also, the following annotations:

Annotation, *Permissibility Under Fourth Amendment of Detention of Motorist by Police, Following Lawful Stop for Traffic Offense, to Investigate Matters Not Related to Offense*, 118 A.L.R. Fed. 567 (1994)

In regard to the use of drug detector dogs, see generally, Annotation, *Use of Trained Dog to Detect Narcotics or Drugs as Unreasonable Search in Violation of Fourth Amendment*, 150 A.L.R. Fed. 399 (1998)

**State Court cases – detention of the motorist and duration of the traffic stop:**

**Owen v. State**, 726 So. 2d 745 (Ala. Cr. App. 1998) – [Detention of motorist until canine unit arrived]

A state trooper stopped Owen for operating a vehicle with one headlight at night. The trooper testified to the following: that Owen immediately got out of his vehicle and made an attempt to enter the trooper's patrol car, the trooper stopped Owen prior to doing so; Owen appeared nervous to the point of shaking; when the trooper tried to look inside Owen's vehicle, Owen would repeatedly try to get between the trooper and the vehicle; that when asked about any previous arrests, Owen denied ever being arrested, but the state trooper radio operator called back that Owens had a NCIC/ACJIC number, indicating a prior arrest; and that Owen would not answer questions about the vehicle's ownership. The trooper became suspicious of Owens and asked for a back-up and narcotic detector dog to arrive on the scene. The trooper detained Owen for about 10 minutes until the narcotic dog arrived and shortly thereafter, the dog alerted to the driver's compartment, indicating concealed drugs. Both marijuana and cocaine were located inside the vehicle.

Upholding the detention and arrest of Owen, the Court contrasted the **Owen** case with the prior decision in **State v. Washington**, supra. In **Owen**, "Trooper Ferrell was able to cite "specific, particularized, and articulable" grounds, other than nervousness, for reasonably suspecting the appellant was engaged in criminal activity." 726 So. 2d at 747. The court went on to list the indices of furtive and suspicious behavior. "All of these factors were relevant to the question whether the appellant was hiding something illegal in his car..."

**Dalton v. State**, 575 So.2d 603 (Ala. 1990) -- [drugs]

The defendants were detained at the Huntsville Airport because they fit a "drug courier profile." They were detained for approximately 40 minutes to an hour until a narcotics-detecting dog arrived. The officers' conduct did not exceed the permissible limits of a *Terry*-type detention because the police had such short notice of the defendants' arrival and did not have an opportunity to have the dog immediately available.

**Sides v. State**, 574 So.2d 856 (Ala.Cr.App.), affirmed, 574 So.2d 859 (Ala. 1990)

The defendant's "traffic arrest" for speeding and the trooper's limited detention of the defendant while the trooper attempted to confirm or dispel his suspicion that the defendant was under the influence was permissible. The trooper did not allow the defendant to sign the speeding ticket while the trooper investigated his suspicion that the defendant was intoxicated; therefore the detention was not illegal.

**Smith v. State**, 606 So.2d 174 (Ala.Cr.App. 1992)

Once a routine traffic stop has been made based on probable cause to believe a traffic offense has been committed, the officer may either keep the driver of vehicle in the car, or require the driver to exit vehicle, even though the officer may lack a particularized reason for believing that driver possesses weapon.

**Hawkins v. State**, 585 So.2d 152 (Ala.Cr.App. 1990), reversed, 585 So. 2d 154 (Ala. 1991)

Hawkins was stopped for a traffic violation. He was then given a citation for driving without a license and he gave the officer writing the citation a false name. Hawkins was then given a second citation for driving without a license. He signed both citations in lieu of going to jail on

the traffic charges. Hawkins was then arrested for giving false information to a police officer in violation of § 29-18, Montgomery City Code, a separate non-traffic related misdemeanor. During a custodial search at the jail, the police found cocaine in Hawkins's possession. The warrantless arrest was proper under § 15-10-3 and was not a violation of § 32-1-4.

The Court held that a person may not be placed under custodial arrest for driving without a license. The Supreme Court found that Hawkins was arrested for giving false information and not for a traffic offense.

***Pittman v. State***, 541 So.2d 583 (Ala.Cr.App. 1989)

An officer who is justified in stopping a driver for a traffic violation may detain the driver until he completes the UTTC and is justified in using the reasonable force necessary to keep the driver detained until the UTTC is completed. A driver who attempts to exit the patrol car before the officer has completed the UTTC may be charged with resisting arrest.

***McDaniel v. State***, 526 So.2d 642 (Ala.Cr.App. 1988)

Custodial arrest was illegal where motorist was arrested only for speeding and not for driving under the influence.

***Hays v. City of Jacksonville***, 518 So.2d 892 (Ala.Cr.App. 1987)

A custodial arrest is not authorized for a misdemeanor traffic offense (with some exceptions found in § 32-1-4). Improper lane usage will not justify a custodial arrest where the defendant is willing to sign the UTTC.

In this regard, see also:

- ***Sheffield v. State***, 522 So.2d 4 (Ala.Cr.App. 1987) (speeding).
- ***McDaniel v. State***, 526 So.2d 642 (Ala.Cr.App. 1988) (speeding).
- ***McCall v. State***, 534 So.2d 668 (Ala.Cr.App. 1988) (speeding).
- ***Morton v. State***, 452 So.2d 1361 (Ala.Cr.App. 1984) (speeding, driving while license revoked).<sup>24</sup>

***Spann v. State***, 440 So.2d 1224 (Ala.Cr.App. 1983)

Fact that the deputy sheriff had not completed minimum training requirements did not render unlawful his arrest of defendant for DUI.

***Brown v. State***, 821 So. 2d 219 (Ala. Cr. App. 2000): Fact that the law enforcement officer who made the traffic stop did not later issue a citation to the driver did not render the stop unlawful. Provided there was lawful basis for the stop, the officer's decision not to subsequently issue a traffic citation does not render the initial stop invalid.

## **I. Detention of passengers; control over passengers; authority to search vehicle**

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<sup>24</sup> ***Morton*** was partly *overruled* in regards to police seizure and impoundment of vehicle by the later decision in ***Cannon v. State***, 601 So. 2d 1112 (Ala. Cr. App. 1992). Police impoundment of vehicle is gauged under the reasonableness standard and the inherent police authority of the "community caretaking function."

***Maryland v. Wilson***, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997)

A police officer may, without probable cause to stop or detain the passengers, but merely to ensure the officer's own safety, order passengers in a lawfully stopped car to exit the vehicle pending completion of the stop.

The *Maryland v. Wilson* decision extends the bright-line rule of *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) (permitting officers to routinely order lawfully stopped motorists to exit their vehicles) to passengers.

***Brendlin v. California***, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007) When a police officer makes a traffic stop, a passenger in the vehicle as well as the driver of the car is seized within the meaning of the Fourth Amendment. A person seized by police action is entitled to challenge the seizure, even if not the operator of the vehicle. In *Maryland v. Wilson*, supra, the Court held that during a lawful traffic stop, the police may order a passenger out of the car, as a precautionary measure. By the same measure, a passenger is seized by police authority and has standing to challenge the lawfulness of the vehicle stop. Where, as in this case, the automobile was stopped without reason to believe it was being operated unlawfully, the subsequent seizure of the passenger was unlawful.

***Arizona v. Johnson***, \_\_\_ U.S. \_\_\_, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009): In *Terry v. Ohio*, 392 U. S. 1, the Supreme Court held that a “stop and frisk” may be conducted without violating the Fourth Amendment’s ban on unreasonable searches and seizures if two conditions are met: first, the investigatory stop (temporary detention) must be lawful, a requirement met when a police officer reasonably suspects that the person detained is committing or has committed a crime; second, to proceed from a stop to a frisk (“pat-down” for weapons), the officer must reasonably suspect that the person stopped is armed and dangerous. For the duration of a traffic stop, the Court recently confirmed, a police officer effectively seizes “everyone in the vehicle,” the driver and all passengers. *Brendlin v. California*, 551 U. S. 249, 255.

From the Court’s syllabus, the following abbreviated summary of the Court’s holding in *Arizona v. Johnson* is provided:

“*Terry* established that in an investigatory stop based on reasonably grounded suspicion of criminal activity, the police must be positioned to act instantly if they have reasonable cause to suspect that the persons temporarily detained are armed and dangerous. 392 U. S., at 24. Because a limited search of outer clothing for weapons serves to protect both the officer and the public, a patdown is constitutional. *Id.*, at 23–24, 27, 30–31. Traffic stops, which “resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*,” *Berkemer v. McCarty*, 468 U. S. 420, 439, n. 29, are “especially fraught with danger to police officers,” *Michigan v. Long*, 463 U. S. 1032, 1047, who may minimize the risk of harm by exercising “ ‘unquestioned command of the situation,’ ” *Maryland v. Wilson*, 519 U. S. 408, 414.

Three decisions cumulatively portray *Terry*’s application in a traffic-stop setting. In *Pennsylvania v. Mimms*, 434 U. S. 106 (*per curiam*), the Court held that “once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get

out of the vehicle without violating the Fourth Amendment,” *id.*, at 111, n. 6, because the government’s “legitimate and weighty” interest in officer safety outweighs the “*de minimis*” additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle, *id.*, at 110–111. Citing *Terry*, the Court further held that a driver, once outside the stopped vehicle, may be patted down for weapons if the officer reasonably concludes that the driver might be armed and dangerous. 434 U. S., at 112. *Wilson*, 519 U. S., at 413, held that the *Mimms* rule applies to passengers as well as drivers, based on “the same weighty interest in officer safety.” *Brendlin*, 551 U.S., at 263, held that a passenger is seized, just as the driver is, “from the moment [a car stopped by the police comes] to a halt on the side of the road.” A passenger’s motivation to use violence during the stop to prevent apprehension for a crime more grave than a traffic violation is just as great as that of the driver. 519 U. S., at 414. And as “the passengers are already stopped by virtue of the stop of the vehicle,” *id.*, at 413–414, “the additional intrusion on the passenger is minimal,” *id.*, at 415. Pp. 5–7.”

*Arizona v. Gant*, \_\_\_ U.S \_\_\_, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009): In *New York v. Belton*, 453 U.S. 454 (1981), the Court upheld a police search of the passenger compartment of a vehicle and any containers therein as contemporaneous incident to the occupant’s lawful arrest. In *Arizona v. Gant*, the Court overturned the long-standing police practice of “search incident arrest” when the arrested subject is taken from an automobile, generally as a consequence of an arrest for a traffic offense. The *Gantt* ruling significantly restricts *Belton*, the “search incident to arrest” doctrine, and rejected a broad reading of *New York v. Belton*.

Gant was arrested by Tucson, Arizona police for driving with a suspended license. Gant was handcuffed and secured in the back of a patrol car. With several officers at the scene, officers searched Gant’s vehicle and found cocaine in Gant’s car during the “search incident to arrest.” Gant filed a motion to suppress in the state court which was granted, and the state appealed.

The U.S. Supreme Court held that a search of the passenger compartment of a vehicle following an arrest is permitted: “only if [1] the arrestee is within reaching distance of the passenger compartment at the time of the search or [2] it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee’s vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.”

The holding of *Chimel v. California*, 395 U. S. 752 (1969), the so-called “wingspan test,” continues to be good law, insofar as the search incident to arrest can be justified by the suspect’s ability to lunge to an area and destroy evidence or reach a weapon. However, once a suspect is handcuffed and moved away from the vehicle, the suspect’s ability to reach for evidence or obtain a weapon from within the vehicle is eliminated, or at least significantly reduced.

*Gantt* is an extension of the Court’s ruling in *Thornton v. United States*, 541 U. S. 615 (2004). In that case, the Court recognized that a search of a vehicle incident to the arrest of a recent occupant may be also justified “when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” The *Gant* decision leaves the *Thornton* holding intact.

However, because Gant and the other two suspects were in custody, handcuffed, and secured in separate police cars, the Court refused to apply the *Chimel* lunge or “wingspan” justification to the case. And, because Gant was arrested for a driver license violation, the *Thornton* evidentiary search holding did not apply. The Court held was not reasonable to believe that the vehicle held evidence of Gant’s suspended driver license status, thus any further search of Gant’s vehicle was unnecessary and invalid under the Fourth Amendment.

***State v. Abner***, 889 So. 2d 52 (Ala. Cr. App. 2004)

During a traffic stop, the deputy sheriff making the stop asked the driver to produce his driver license. The driver was unable to do so because his license had been revoked. The deputy testified he planned to allow the passenger, Abner, to drive the car, and he asked Abner for identification. Following the deputy’s request, Abner demonstrated signs of nervousness. The deputy asked Abner to step out of the vehicle. When Abner did so, the deputy observed rolling papers in plain view, a white rock-like substance, and a small plastic bag sticking out from the side of the passenger seat. Further investigation showed the contents of the plastic bag were a green, leafy substance similar in appearance to marijuana. The deputy believed the white material was cocaine and the green leafy material was marijuana. Upon questioning, Abner admitted the drugs belonged to him. Abner was arrested at the scene.

A motion to suppress was filed by the defendant and granted by the trial court. On appeal by the state, the Court of Criminal Appeals found that under the doctrine of *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), a police officer may, as a matter of course, order the driver to exit a lawfully stopped automobile. This doctrine was extended to passengers in the case of *Maryland v. Wilson*, 519 U.S. 408 (1997). The Court of Criminal Appeals recognized this rule in the case of ***State v. Hails***, 814 So. 2d 980 (Ala. Cr. App. 2000).

In this case, the vehicle was lawfully stopped for a mechanical violation. The officer asked for the driver’s license, and the driver was unable to produce a license. The deputy asked for the passenger to produce a license. The passenger, Abner, demonstrated nervousness when dealing with the officer; whereupon the officer directed Abner to step out of the vehicle in effort to better deal with the situation. Once Abner got out of the vehicle, the deputy saw contraband in plain view in and around the location where Abner was sitting. Seeing what is in plain view does not constitute a search. ***Johnson v. State***, 784 So. 2d 373 (Ala. Cr. App. 2000) and ***Pearson v. State***, 542 So. 2d 955 (Ala. Cr. App. 1989). Therefore, the seizure was valid under the plain-view doctrine.

## Roadblocks

### A. Constitutional Issues

***Michigan Department of State Police v. Sitz***, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990)

Upholding the constitutionality of the use of DUI roadblocks, the Supreme Court held that the Fourth Amendment does not forbid the initial stop and brief detention, without individualized suspicion, of all motorists passing through a highway checkpoint established to detect and deter drunk driving and conducted in conformity with guidelines on operation, site selection, and publicity.

***Ex parte Jackson***, 886 So. 2d 155 (Ala. 2004) -- [Adopting the ***Cains*** standard to determine the Constitutionality of police roadblocks]

A Mobile County jury convicted Jackson of first-degree unlawful possession of marijuana, following Jackson's arrest at a roadblock operated by the Mobile County Sheriff's Department. Prior to 2001, the Mobile Housing Authority entered into a contract with the Mobile County Sheriff's Department authorizing the Sheriff's Department to conduct policing operations in the housing project, using vehicle patrols, foot patrols, community policing, and safety checkpoints to establish a "police presence."

On the evening of May 10, 2001, the Sheriff's Department established a "safety checkpoint" at the intersection leading into the housing community. A senior supervisor from the Sheriff's Department had approved the operation beforehand. The checkpoint officers checked for driver licenses, automobile insurance documentation, and safety devices, such as seat-belts and child restraint seats. A total of seven marked police units operated the checkpoint and every vehicle that came through the intersection was stopped. Guidelines established by the Sheriff's Department concerning the operation of a checkpoint were followed and the officers conducting the checkpoint were supervised by an on-scene superior officer.

An officer stopped Jackson's vehicle at the roadblock and discovered marijuana and two rolls of cash on Jackson. A larger quantity of marijuana was located in the vehicle following Jackson's detention. At trial, Jackson filed a motion to suppress alleging the marijuana found on his person and leading to the subsequent discovery of the larger amount of marijuana was the result of an unreasonable seizure that violated the Fourth Amendment. Jackson contended his arrest was based on the same type activity condemned in ***Hagood v. Town of Town Creek***, 628 So. 2d 1057 (Ala. Cr. App. 1993).

The Alabama Supreme Court noted the United States Supreme Court has established objective criteria in determining whether a roadblock-type stop is constitutional. In ***Brown v. Texas***, 443 U.S. 47 (1979), the court fashioned a three-prong balancing test to determine if the seizure is considered reasonable: "Consideration of the constitutionality of such seizure involves a weighing of [1] the gravity of the public concerns served by the seizure, [2] the degree to which the seizure advances the public interest, and [3] the severity of the interference with individual liberty."

In ***Michigan Department of State Police v. Sitz***, 496 U.S. 444 (1990), the U.S. Supreme Court extended the application of these three conditions to determine the lawfulness of a "sobriety checkpoint." In roadblock-type cases reaching the Supreme Court where a published opinion was

issued, the Supreme Court has explicitly upheld roadblock-type stops in four situations:

- 1) stops gathering information of a recent crime when the questioning did not seek self-incriminating information, *Illinois v. Lidster*, 540 U.S. 419 (2004)
- 2) stops to check an operator's driver license, *Texas v. Brown*, 460 U.S. 730 (1983)
- 3) stops to check a driver's sobriety, *Sitz*, supra
- 4) stops to check the presence of illegal aliens, *Martinez-Fuerte*, 428 U.S. 543 (1976)

The U.S. Supreme Court has expressly disapproved the use of "drag-net" type roadblocks where the police, without individualized suspicion, stopped vehicles for the primary purpose of discovering and interdicting illegal narcotics. See, *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

In the *Jackson* opinion, the Alabama Supreme Court quoting with approval, examined the extensive opinion written by Judge Bowen in *Cains v. State*, 555 So. 2d 290 (Ala. Cr. App. 1989), and found the standards expressed in *Cains* to be the correct statement of law. The Court found that roadblocks, conducted under supervised conditions and using established standards of enforcement, met the Constitutional test required in weighing the balancing of the interests in the public's safety and the individual's reasonable expectation of privacy.

In the *Jackson* case, the Court found the following facts: that a plan was established pursuant to the Sheriff's Department supervisory command; that the officers checked driver licenses and automobile insurance documents; that every vehicle was stopped and checked and the officers had no discretion in deciding whom to stop; that the stop took less than one minute per vehicle, unless the driver lacked proper license or registration; and that an on-scene supervisor was present to oversee the operation. All of these steps undertaken by the Sheriff's Department placed the roadblock in context to the approved *Cains* type roadblock, rather than the disapproved *Hagood* "drag-net" situation.

See also the following annotations:

- Annotation, *Validity of Routine Roadblocks by State or Local Police for Purpose of Discovery of Driver's License, Registration, and Safety Violations*, 116 A.L.R. 5<sup>th</sup> 479 (2004)
- Annotation, *Validity of Police Roadblocks or Checkpoints for Purpose of Discovery of Alcoholic Intoxication—post-Sitz Cases*, 74 A.L.R. 5<sup>th</sup> 319 (1999)

## **B. Alabama Cases- roadblock seizures**

*Kirby v. State*, 874 So. 2d 581 (Ala. Cr. App. 2003)

Affirming conviction for DUI, Court of Criminal Appeals held the defendant failed to establish

that the roadblock where he was apprehended did not comply with the Department of Public Safety regulation that required a trooper supervisor to approve the time and location of checkpoint prior to checkpoint being implemented, where the trooper who conducted the checkpoint testified that before the checkpoint was implemented, another trooper called him on the radio and informed him the on-duty supervisor had approved the checkpoint. The trooper also testified that officers from another state agency were present at the scene and cooperated in the checkpoint.

[**Editor's Note:** The Department of Public Safety regulation referred to the *Kirby* opinion was written and instituted by the Department immediately after the *Cains* decision was released in 1989 in order to ensure DPS troopers and supervisors complied with the criteria expressed in *Cains*. Current policy of the Department of Public Safety requires a supervisor to pre-approve every DPS roadblock subject to established written standards, and to submit a form (HP form 8-A) after every completed roadblock.]

*Stone v. State*, 705 So. 2d 1316 (Ala. Cr. App. 1996)

Where a state trooper roadblock on July 4<sup>th</sup> weekend was established in accordance with the written policy of the Department of Public Safety and followed the standards of objective reasonableness set forth in *Cains v. State*, supra, and complied with standards set in *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, and all vehicles were stopped and checked in the same manner, the seizure of the defendant for DUI was lawful.

*Hagood v. Town of Town Creek*, 628 So.2d 1057 (Ala.Cr.App. 1993) -- [Improperly Conducted Roadblock]

While license checks, sobriety checkpoints, and roadblocks are not on their face unconstitutional, a Fourth Amendment seizure occurs when the vehicle is stopped in connection with such an operation. A roadblock is a warrantless seizure and is presumed invalid. Therefore, the prosecution has the burden of proving its overall reasonableness and validity.

Here, a warrantless roadblock, set up in front of an apartment building, ostensibly to check drivers' licenses, violated the motorist's Fourth Amendment rights. The officer testified that the roadblock was actually for the impermissible general police purpose for cutting down on drinking and disturbance occurring in building. There was no restriction on the officers' discretion in establishing the roadblock, and appropriate safety measures were not taken. A warrantless roadblock designed to promote general law enforcement purposes (the prevention of trouble, fighting, public drunkenness, and disorderly conduct at an apartment complex) is improper in that the purpose or the governmental interest to be served by the roadblock must be one that can reasonably be advanced by the roadblock.

The Court refused to declare all roadblocks unconstitutional under Art. I, § 5 of the Alabama Constitution.

Other factors considered in the *Hagood* decision that the Court found improper and beyond the standards of a constitutionally approved roadblock were: 1) the primary purpose of the roadblock was 'general law enforcement' as compared to traffic enforcement; 2) there were no written guidelines on conducting the roadblock and the officers had complete discretion on stopping

vehicles; and 3) there were too few safety measures employed at the scene.

*Cains v. State*, 555 So.2d 290 (Ala.Cr.App. 1990) – [Validity of roadblocks under Alabama law]

“If the primary stop at the roadblock had been constitutionally infirm, then any additional detention would, of course, have been invalid. See, *State v. Calhoun*, 502 So.2d 808 (Ala.1986). Having determined that the roadblock at issue here was reasonable under the balancing tests set out by the Supreme Court in *Martinez-Fuerte*, *Delaware v. Prouse*, and *Texas v. Brown*, we hold that Trooper McGlothlin had reasonable suspicion, based on his initial observation of the defendant, to divert the defendant from the line of traffic for further inquiry as to his sobriety. Then, upon the defendant’s failure to pass the field sobriety test, the officer had probable cause to arrest him for DUI and transport him to police headquarters for a blood alcohol test.

“It is undisputed that ‘stopping an automobile and detaining its occupants constitute a ‘seizure’ within the meaning of [the Fourth Amendment],’ *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979). ‘Checkpoint stops are “seizures,”’ *United States v. Martinez-Fuerte*, 428 U.S. 543, 556, 96 S.Ct. 3074, 3082, 49 L.Ed.2d 1116 (1976). The Fourth Amendment requires that such seizures be reasonable. *Delaware v. Prouse*; *Martinez-Fuerte*; *Terry v. Ohio*.” \*\*\* In “*Delaware v. Prouse*, the Court ...concluded with the following observation, which has been the basis for roadblock stops ever since: ‘This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.’ Id. at 663, 99 S.Ct. at 1401. Four years later, the Court specifically approved drivers’ license checkpoints in *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). \*\*\* When read together, *Brignoni-Ponce*, *Martinez-Fuerte*, *Prouse*, and *Texas v. Brown* stand for the proposition that random stops or spot checks are unreasonable in the absence of individualized suspicion of wrongdoing; on the other hand, stops at fixed checkpoints or roadblocks are reasonable if they are carried out pursuant to a neutral and objective plan, are supported by a strong public interest, and are only minimally intrusive to the individual motorist.

Many jurisdictions have adopted the thirteen-factor analysis set out in *State v. Deskins*, 673 P.2d at 1185: ‘Numerous conditions and factors must be considered in determining whether a DUI roadblock meets the balancing test in favor of the state. Among the factors which should be considered are: (1) The degree of discretion, if any, left to the officer in the field; (2) the location designated for the roadblock; (3) the time and duration of the roadblock; (4) standards set by superior officers; (5) advance notice to the public at large; (6) advance warning to the individual approaching motorist; (7) maintenance of safety conditions; (8) degree of fear or anxiety generated by the mode of operation; (9) average length of time each motorist is detained; (10) physical factors surrounding the location, type and method of operation; (11) the availability of less intrusive methods for combating the problem; (12) the degree of effectiveness of the procedure; and (13) any other relevant circumstances which might bear upon the test.’ In our judgment, roadblocks operated pursuant to an objective and neutral plan of briefly halting all oncoming traffic are only minimally intrusive to the individual motorist and are thus constitutionally reasonable seizures. The primary reason that the random stops in *Brignoni-Ponce* and *Prouse* were condemned, while the checkpoint operations in *Martinez-Fuerte* and

*Texas v. Brown* were approved, had little to do with the relatively minor mechanical operation of either kind of seizure. The approved stops were upheld because they were conducted pursuant to an ‘objective standard,’ *Delaware v. Prouse*, 440 U.S. at 661, 99 S.Ct. at 1400, and because they ‘both appear[ed] to and actually involve[d] less discretionary enforcement activity,’ *Martinez-Fuerte*, 428 U.S. at 559, 96 S.Ct. at 3083. The condemned stops were invalidated because they involved the ‘standardless and unconstrained discretion’ of officers in the field, *Delaware v. Prouse*, 440 U.S. at 661, 99 S.Ct. at 1400. It is true in this case that the site, time, and duration of the roadblock were chosen by ‘officers in the field.’ [W]e do not believe that the field officers’ decision to establish this roadblock makes it unconstitutional.

***Brunson v. State***, 580 So.2d 62 (Ala. Cr. App. 1991) [Brunson’s conviction was reversed and remanded for new trial based on the trial court improperly admitted, over the defendant’s objection, the introduction of the horizontal gaze nystagmus test without adequate foundation, as required in ***Malone v. City of Silverhill***, 575 So. 2d 101 (Ala. Cr. App. 1989), reversed, ***Ex parte Malone***, 575 So. 106 (Ala 1990); the Court of Criminal Appeals addressed Brunson’s second issue which challenged the use of police roadblocks]:

The appellant argues that the stop and arrest at the roadblock violated his rights under the Alabama Constitution of 1901, Art. I, § 5. This court held in ***Cains v. State***, 555 So.2d 290 (Ala. Cr.App.1989), that ... “roadblocks operated pursuant to an objective and neutral plan of briefly halting all oncoming traffic are only minimally intrusive to the individual motorist and are thus constitutionally reasonable seizures.” ***Cains***, at 296. Here the evidence established such an “objective and neutral plan.” The roadblock was not violative of the Alabama Constitution.”

***Ynosencio v. State***, 629 So. 2d 795 (Ala. Cr. App. 1993): Restating and applying the ***Cains*** standards in the establishment and operation of a police roadblock, the Court of Criminal Appeals upheld Ynosencio’s conviction for trafficking in cannabis where, after defendant’s vehicle was initially stopped as part of a roadblock to check operator’s license and registration, and then directed to a “secondary search area” after a narcotics detection dog alerted to a tool box located on Ynosencio’s tractor-trailer, the subsequent search resulted in a large amount of marijuana uncovered in a tool box on the truck bed, the Court found neither the initial stopping of vehicles at the roadblock, nor the use of narcotics detection dogs as part of the overall enforcement plan, was violative of the Fourth Amendment.

***McInnish v. State***, 584 So.2d 935 (Ala.Cr.App. 1991)

The appellant argued that the DUI roadblock involved in this case constituted an unconstitutional search and seizure. The appellant filed a pretrial motion to dismiss. Two grounds of that motion were that there was no probable cause for his arrest and that the arrest was in violation of the Fourth Amendment to the Constitution of the United States. The record contains no ruling on that motion.

At the close of the State’s case-in-chief, defense counsel’s motion for a judgment of acquittal included the following: “I renew the motion to suppress on the grounds the roadblock at the time was unconstitutional and violated the fourth amendment rights against unreasonable search and seizure.” Under the facts of this case, we do not consider this issue to have been sufficiently

preserved for consideration on appeal. There was no pretrial motion to suppress. There was no request for a ruling on the pretrial motion to dismiss. At trial, the arresting officer testified, without objection, to the fact that the appellant was stopped at a “license check.” In both the motion to suppress (made in conjunction with the motion for judgment of acquittal) and the renewed motion to suppress, the appellant failed to state any reasons to support his allegation that the license check or roadblock was unconstitutional. Although defense counsel did indicate that he was going to furnish the trial court with “a citation of each and every case regarding the standard of roadblocks,” the record contains no further mention of this matter.

License checks, sobriety checkpoints, and roadblocks are not intrinsically unconstitutional, *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), although the manner in which they are conducted may be unconstitutional, *Cains v. State*, 555 So.2d 290 (Ala.Cr.App.1989). Here, the issue of the constitutionality of the stop of the appellant is not preserved for appellate review because the appellant never told the trial court why or how the roadblock was unconstitutional. “[T]he trial court is not required to cast about for tenable grounds of objection.” *Watkins v. State*, 219 Ala. 254, 255, 122 So. 610, 611 (1929).

*Smith v. State*, 515 So.2d 149 (Ala.Cr.App. 1987)

A state trooper had reasonable suspicion for investigatory stop where he observed the defendant’s vehicle coming around a curve in sight of the roadblock and turn rapidly into driveway, making the trooper suspicious that the defendant was attempting to avoid the roadblock for driver’s license check.

*State v. White*, \_\_ So. 3d \_\_, 2009 WL 2415202 (Ala. Cr. App. Aug. 7, 2009): Defendant’s conduct in approaching a driver license checkpoint, turning around, and then heading in the opposite direction, provided the officer with reasonable suspicion justifying an investigatory stop.

But see, *Ex parte Odom*, 788 So. 2d 884 (Ala. 2000): In a dissenting opinion to denial of certiorari, three justices of the Supreme Court would grant certiorari to examine the trial record and determine if there was any basis, other than defendant’s otherwise legal U-turn when approaching a state trooper roadblock, to create sufficient reasonable suspicion to justify the stop the vehicle.